Mr Justice Catron—
Maps

SUPREME COURT OF THE UNITED STATES.

No. ~~365.~~ 139.

THE UNITED STATES, APPELLANTS,

vs.

VICENTE P. GOMEZ.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 365.

THE UNITED STATES, APPELLANTS,

vs.

VICENTE P. GOMEZ.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

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Transcript of the proceedings in case No. 569.

VICENTE GOMEZ, claimant,
vs.
THE UNITED STATES, defendant.

For the place named "Pinoche Grande," in the northern district of Cal.

1 OFFICE OF THE BOARD OF COMMISSIONERS TO ASCERTAIN AND SETTLE THE PRIVATE LAND CLAIMS IN THE STATE OF CALIFORNIA.

Be it remembered, that on this ninth day of February, anno Domini one thousand eight hundred and fifty-three, before the commissioners to ascertain and settle the private land claims in the State of California, sitting as a board in the city of San Francisco, in the State aforesaid, in the United States of America, the following proceedings were had, to wit:

The petition of Vicente Gomez for the place named "Pinoche Grande" was presented, and ordered to be filed and docketed with No. 569, and is as follows, to wit:

(Vide page 3 of this transcript.)

Upon which petition the following subsequent proceedings were had in their chronological order, to wit:

SAN FRANCISCO, *February* 12, 1853.

In case No. 569, Vicente Gomez for the place named "Pinoche Grande," the deposition of James L. Ord, a witness in behalf of the claimant, taken before Commissioner Hiland Hall, was filed.

(Vide page 10 of this transcript.)

SAN FRANCISCO, *February* 24, 1853.

In the same case the deposition of José Castro, a witness in behalf of the claimant, taken before Commissioner Harry J. Thornton, with document marked H. J. T. No. 1, annexed thereto, was filed.

(Vide page 12 of this transcript.)

SAN FRANCISCO, *October* 27, 1853.

In the same case, the deposition of José Abrigo, a witness in behalf of the claimant, taken before Commissioner Alpheus Felch, was filed.

2 (Vide page 5 of this transcript.)

SAN FRANCISCO, *November 2d*, 1853.

In the same case, the deposition of Oscar de Grandkargue, a witness in behalf of the claimant, taken before Commissioner R. Aug. Thompson, was filed.

(Vide page 9 of this transcript.)

SAN FRANCISCO, *December* 5, 1854.

Case No. 569 was ordered to be placed at the foot of the 3d class cases on the trial docket.

SAN FRANCISCO, *December* 19, 1854.

Case No. 569 was submitted under the rule of 21st March, 1854.

SAN FRANCISCO, *March* 6, 1855.

In the same case, Commissioner S. B. Farwell delivered the opinion of the board rejecting the claim.

(Vide page 19 of this transcript.)

And the following order was made, to wit:

(Vide page 211 of this transcript.)

3 *Petition.*

To the board of commissioners for ascertaining and settling private land claims in the State of California:

The petition of Vicente Gomez, of Monterey county, California, respectfully represents, that some time in the year 1844, Manuel Micheltorena, then governor of Upper California, granted to your petitioner a certain tract of land called Panoche Grande, of the extent of four square leagues, (now lying and being in the county of San Joaquin,) bounded as follows:

On the south, by the land of Francisco Aryas; on the north, by the lands of Julian Urzera and the low hills; and to the west, by the barren hills, as explained by the map hereto annexed. Your petitioner alleges, that for some time before the military occupation of Monterey, California, by the American forces, (Feb'y 7th, 1846.) he was a clerk in the commissary's office of Monterey; and that at that time he had his original title-papers for said tract of land deposited in his desk in said office of the commissary; that shortly before the naval forces of the United States took possession of the town of Monterey, he had left the town with some of the Mexican troops, to assist in the defence of the country; that when he so left Monterey, he left his said original grant of said land in his desk, in the office of the commissary as aforesaid, believing it to be in a secure place; that upon his return to Monterey, he found it in possession of the United States troops, and the public buildings, offices, and papers were all in the possession of and guarded by American soldiers. Your petitioner made application, without delay, to the American officer who had charge of the office and papers where his said original titles for said tract of land were deposited as aforesaid, but the said
4 officer (Lieut. Maddox of the United States marine corps) refused to deliver any paper or papers then in his possession or under his charge.

Your petitioner alleges that the map herewith presented is the

map which accompanied the original espediente, and that the grant made as aforesaid, by Governor Micheltorena, was of the land delineated by this map.

Your petitioner became possessed of this map by permission of the proper officers, for the purpose of having a copy made for his use and benefit, and he had taken it to his private dwelling-house a short time before California fell into the hands of the American authorities. Since he got possession of this map, as aforesaid, it has always remained in his hands. He has made application to the persons in charge of the archives of the former government, which were taken at Monterey, for information in relation to this grant, and title made to him as aforesaid, but it could not be found, nor was the original espediente found.

Your petitioner has heard, and believes and alleges, that many original papers and documents belonging to the government archives taken at Monterey on the 7th of July, 1846, have been since lost or destroyed.

If such be the fact, his title-papers and the espediente must have been among the papers and documents so lost or destroyed. Your petitioner hopes that after such proof as the nature of the case will admit, that your honorable board will confirm his said claim to the said four leagues of land granted as aforesaid, and that he may have a decree accordingly, and general relief, as in duty bound.

P. ORD,
Attorney for Petitioner.

5 Filed in office February 9th, 1853.
GEORGE FISHER, *Secretary.*

Recorded in vol. 1 of Petitions, on pages 549, 550.
GEORGE FISHER, *Secretary.*

Deposition of J. Abrigo.

OFFICE OF THE BOARD OF COMMISSIONERS, &c.

This day, before Commissioner Alpheus Felch, came José Abrigo, a witness in behalf of the claimant, Vicente Gomez, No. 569, who, after being duly sworn, deposes as follows:

The testimony was given in the Spanish language; Mr. Fisher, secretary, &c., acted as interpreter.

Questions by Mr. Ord, attorney for claimant.

1 question. What is your name, age, and place of residence?

Answer. My name is José Abrigo; my age, forty years; and I reside at Monterey, in California; I have lived here twenty years.

2 question. Do you know Vicente Gomez, of Monterey? If yea, how long have you known him?

Answer. I know him, and have known him in Monterey, during the last fifteen years. He is a native-born Mexican citizen.

3 question. Do you know anything about his having a title or grant

of land in California, given to him by the governor? If yea, state generally what you know about it.

Answer. In the year 1845 the said Gomez showed to me a title to the land called La Panocha, near the rancho of San Luis Gonzaga, belonging to Francisco Perez Pacheco, issued by Governor Micheltorena, in the latter part of 1844 or the beginning of 1845, I do not recollect which. Said Gomez was at that time one of the
6 clerks of the commissary general of California, of which office I was the chief. After showing me the said title-papers, the said Gomez placed the same for safe-keeping among the papers belonging to the archives of said office, where it remained until the said archives were taken possession of by the American forces, July 7th, 1846, to the best of my recollection.

4 question. Was you at the head of the commissary's office until the Americans took possession of the country?

Answer. I was, and Gomez remained as a clerk until the same time.

5 question. Was the title of which you speak signed by the governor and his secretary?

Answer. It was. It was signed by Micheltorena and Jimeno, the governor and secretary at that time. I know the signature of both of them, having often seen them write. The signatures in the title-papers mentioned were the true and genuine signatures of said Micheltorena and Jimeno.

(Mr. Greenhow objects to this evidence of signatures to documents not produced.)

6 question. Do you know the date of the grant to which you refer?

Answer. I do not.

7 question. Do you know the quantity of land granted by said title?

Answer. It was four square leagues.

8 question. Do you know its boundaries?

Answer. I have seen the plat of it, and have read it, but I do not recollect the boundaries.

9 question. Look at the document now shown to you, marked Exhibit number 1, annexed to the deposition of José Castro, heretofore taken and filed in this case, purporting to be a map of the land claimed in this case, and state whether you have ever seen
7 said map before; and if yea, when, where, and in whose hands you saw it, and what you know about it.

Answer. I have seen it before. I saw it at the same time I saw the title-paper in the hands of said Gomez, as above stated, at Monterey. I believe the paper on which it is drawn is the same kind of paper which I had in my office as commissary at Monterey. When I saw it at Monterey, I believe it was annexed to the title-paper before mentioned.

Questions by Mr. Greenhow, associate law agent.

1 question. How long was Gomez in your office before the occupation of the country by the United States?

Answer. Two years, a little more or less.

2 question. At what place was the grant issued by Governor Micheltorena?

Answer. At Monterey.

3 question. Do you recollect when Governor Micheltorena left Monterey for Los Angeles, when he resigned his office of governor?

Answer. I believe it was in the month of February or March, A. D. 1845.

4 question. Did Gomez remain constantly at Monterey from the time last mentioned until the occupation of the country by the United States?

Answer. He did not. He left Monterey, and joined General José Castro at the time Colonel Frémont appeared at Monterey. This was about the month of May, 1846. I do not recollect his being absent at any other time during the period specified. I frequently gave him leave of absence for twenty days or a month. He
8 was employed in my office, but also had to go when called upon to the office of the secretary of the governor to assist in the office.

Questions by Mr. Ord.

1 question. Did the American troops and authorities retain possession of the government buildings and archives after July 7th, 1846?

Answer. At 9 o'clock on the morning of July 7th, 1846, the American troops took possession of all the archives of the government, which were in various public buildings at Monterey, and carried them in blankets to the custom-house building, where there were about four hundred men stationed under Colonel Frémont, and where many of the papers constituting the public archives were torn up and destroyed. From that time the archives remained in possession of the American authorities, and I do not know what became of them. The papers that were destroyed were torn up and scattered about the streets, and lost. I called on Mr. Hartnell, and requested him to remonstrate with Lieutenant Maddox, who was in command at Monterey, to prevent further destruction of the papers.

Questions by Mr. Greenhow.

1 question. Did Gomez occupy any part of the land in question, or visit it from the time of obtaining the grant to the time of the occupation of the country by the Americans.

Answer. I do not know whether he ever occupied or visited it.

JOSÉ ABRIGO.

Subscribed and sworn to before me this 27th day of Oct., 1853.

ALPHEUS FELCH, *Commissioner.*

Filed in office October 27, 1853.

GEORGE FISHER, *Secretary.*

9 Recorded in Evidence B, vol. 3, page 307.

GEORGE FISHER, *Secretary.*

Depo. of Oscar de Grandkargue.

OFFICE OF THE BOARD OF COMMISSIONERS, &c.

This day, before Commissioner R. Aug. Thompson, came Oscar de Grandkargue, a witness in behalf of claimant, Vicente Gomez, number 569, who, after being duly sworn, deposed as follows:

Testimony on behalf of claimant.

Present: P. Ord, esq., attorney for claimant, and R. Greenhow, esq., associate law agent.

In answer to questions witness states that his name is Oscar de Grandkargue; my age, forty-seven; and present residence, San Francisco.

Question by claimant's attorney. State if you know Vicente Gomez; and if so, how long have you known him?

Answer. I do, and have known him since the year 1845.

Question by same. State if said Gomez ever offered to sell you any land; and if so, what land, and where situated?

Answer. I was in Monterey in the fall of 1845 as master of a whaling ship, and was intimate with the family of said Gomez. One day he offered to sell me a tract of land he had, in extent about three or four leagues, as near as I can recollect. He proposed at that time returning to Mexico. I understood that the land was somewhere in the neighborhood of Monterey. I never saw it. Gomez showed me a document and map, which he told me was a title to the land from Micheltorena. I do not distinctly recollect the name of the place, but think it was Ponocha Grande, or something like it.

Question. Did you understand the Spanish language at that time?

Answer. I did.

O. DE GRANDKARGUE.

Sworn and subscribed before me this 2d of November, 1853.

R. AUG. THOMPSON,
Commissioner.

Filed in office November 2d, 1853.

GEORGE FISHER, *Secretary.*

Recorded in Evidence B, vol. 3, page 345.

GEORGE FISHER, *Secretary.*

Depo. of J. L. Ord.

SAN FRANCISCO, *Feb. 12th*, 1853.

On this day, before Commissioner Hiland Hall, came James L. Ord, a witness in behalf of the claimant, Vicente Gomez, petition number 569, and was duly sworn, his evidence being given in English.

The United States associate law agent was present.

In answer to inquiries by counsel for the claimant, the witness testified as follows: My name, James L. Ord; my age is twenty-nine years; and I reside at Monterey, and am by profession a physician. I

came to California as assistant surgeon in company F of the third regiment of United States artillery in January, 1847, and I have since that time resided in Monterey. In the latter part of said month of January I commenced occupying a portion of the custom-house at Monterey. One end of it I occupied with Captain W. T. Shumean, of the army, as our quarters; and the other end was occupied as a hospital, and was under my charge. The centre of the building was used as a depository for naval stores. In the room occupied
11 as a hospital were Spanish papers, which I supposed were old custom-house papers of no value. The papers were on shelves, which had doors to them. Some of the doors had keys in them, but were not locked. The papers were not in charge of any one to my knowledge. My hospital steward asked me if they were of any value, and I told him I did not know that they were, and some of them were used by him in putting up prescriptions for the sick. I used some myself as waste paper when I first went there. I did not understand Spanish, and it was a month or two before I found out they were of value, from seeing the papers afterwards in charge of Captain Halleck. I think some of those used were espedientes. I cannot form an idea of the quantity of papers thus used. I do not recollect about seeing maps in the papers. Some of them had numbers on the outside. From January until May the papers were in such exposed condition. I left Monterey for a time about the first of May, and when I returned in June the papers were not in the place in which they were when I went away.

In answer to questions by the associate law agent, the witness says he thinks Captain Halleck took charge of the papers when they were removed from the custom-house.

JAMES L. ORD.

Sworn and subscribed before me.

HILAND HALL, *Commissioner.*

Filed in office Feb'y 12th, 1853.

GEORGE FISHER, *Sec'y.*

12 Recorded in Evidence B, vol. 2, p. 571.

GEORGE FISHER, *Secretary.*

Depo. of José Castro.

SAN FRANCISCO, *Feb'y* 24, 1853.

On this day, before Commissioner Harry J. Thornton, came José Castro, a witness in behalf of the claimant, Vicente Gomez, petition number 569, and was duly sworn, his evidence being interpreted by the secretary.

Questions by claimant.

1 question. What is your name, age, and place of residence?

Answer. My name is José Castro; my age is forty-four years; and my residence, in Monterey, California.

2 question. Are you acquainted with Vicente Gomez, and of what country was he, and where did he live?

Answer. I am acquainted with Vicente Gomez; he is by birth a Mexican, and has resided in California since the year 1832.

3 question. Do you know anything of an application being made by the said Gomez for land to the governor of California at any time? And if yea, state what you know on this subject.

Answer. Some time in the year 1844, whilst I was engaged in military service against the Indians, the said Gomez said to me that all the lands with which he was acquainted that were desirable had been granted, and desired that I would inform him of a suitable place to petition for. I recommended him to apply for the place called Panocha. I understood that he afterwards applied to Governor Micheltorena for that place and obtained a grant for it.

4. question Where is that place situated of which you speak
13 as having been recommended by you to Gomez, and which you say you understood he got a grant for?

Answer. This place lies eastward from San Bautista, and about twenty-five leagues distant therefrom.

5 question. Look upon the map now here shown to you, which was filed with the petition in this case, and is now filed as Exhibit No. 1 to this deposition, and say whether or not the same is a correct delineation of the said tract of land above spoken of.

Answer. I have examined the said map. I cannot say that it is an exact delineation of the said tract, but in the general outlines I would say it was.

6 question. What office, if any, was held by the said Gomez, under the former government of this country?

Answer. Gomez was first clerk in the commissary's department at Monterey, from some time in 1846 to the change of government.

Questions by United States law agent.

1 question. Are you acquainted with the land claimed in this case from your own personal knowledge?

Answer. I know the place well from personal observation, having camped upon it for fifteen or twenty days.

2 question. Have you any knowledge of the fact, or have you reason to believe, that Gomez ever occupied this land, or visited it himself?

Answer. I do not know anything of the matter of his occupation or visits to the place. Have seen Gomez only once after having recommended him to apply for the land.

3 question. What public offices have you held in California under the former government?

Answer. I have filled the offices of political chief of Califor-
14 nia, and a member of the territorial deputation; I was also prefect and commandant general.

JOSÉ CASTRO.

United States law agent present.

Sworn to and subscribed before me, this 24th of February, 1853.

HARRY J. THORNTON,
Commissioner.

Filed in office February 24, 1853.

GEORGE FISHER, *Secretary.*

Recorded in Evidence B, vol. 2, page 602.

GEORGE FISHER, *Secretary.*

15 *Espediente.—H. J. T. No.* 1, *annexed to the deposition of José Castro.*

Sello cuarto—Dos reales.

Habilitado provicionalmente por la aduana maritima del puerto de Monterey en el departamento de las Calif'a paró los años de mil ochocientos cuarenta y cuatro y mil ochocientos cuarenta y cinco.

MICHELTORENA.
PABLO DE LA GUERRA.

MONTEREY, *Nob'e* 14 *de* 1844. Yn'fo el S. S'rio del despacho to mando autes otros libres necesitar.
MICHELT'A.

Ex'mo S'or Gob'or:

Vicente Gomez, Mejicano por nacimiento y vecino de esta capital anté la justificacion de V. E. y como mas halla lugar en derecho espone: que deseando dedicaruse al hermoso y naciente ramo de la agricultura que es de tan vital en este depart'o solicito de la bondad de V. E. se digue concederme en propiedad el parage conocido con el nombre de Panocha Grande, colind'te por el norte con Don Julian Ylisuma por el sur con la Serrania por el oriente con el Valle de los Tulanes y al poniente con Don Francisco Arias; cuyo terreno demarca la estension de tres sitios de ganado mayor poco mas ó menos segun esplica el diseño que a su debido t'po presentnaé mas correcto que el que hara acompaña. Como por lo espuerto suplico a V. E. se digne tener en consideracion mi presente solicitud para de este modo proporcionar la subsistencia necesaria de mi crecida familia.

G. T. á V. E. rendidam'te suplico prosea como llebo imet's cudo esperrando merced y gracia. Jurando lo necesario, &c.

Monterey, Marzo 13 de 1843.

VICENTE GOMEZ.

Como dispone el E. S. Gobernador pate la presedente instancio al Suez 1o. de San Juan para que informe lo que sea justo y buetta a esta secretaria para proveer.

Monterey, 14 de Marzo de 1843.

MAN'L JIMENO.

En cumplimiento de la superior de N. E. en la que se me pide in forme si el terreno que se solicita en hesta instancia se halla baldio y'n lo que informo que no hay inconveniente pa. su consesion.

S. Juan, 20 de Marzo de 1844.

(Here follows map, page 16.)

16 OFFICE OF SURVEYOR GENERAL OF THE UNITED STATES FOR CALIFORNIA.

I, John C. Hays, surveyor general of the United States for the State of California, and as such having in my office, and in my charge and custody, a portion of the archives of the former Spanish and Mexican territory or department of Upper California, by virtue of the power in me by law, do hereby certify that the four preceding and hereunto annexed pages of tracing paper, numbered from one to four, inclusive, exhibit a true and accurate copy of a certain document now on file and forming a portion of the said archives in this office, the same being the only document in the archives in relation to the tract called "Panoche Grande," petitioned for by Vicente Gomez.

In testimony whereof, I have hereunto signed my name officially, and caused my seal of office to be affixed, at the city of San Francisco, this thirty-first day of October, 1853.

JOHN C. HAYS,
U. S. Surveyor G'l for Calif'a.

Filed in office Nov'r 3, 1853.

GEO. FISHER, *Sec'y.*

17 *Translation of espediente.*

Seal of the fourth class.

Provided provisionally for the maritime custom-house of Monterey, in the department of the Californias, for the years one thousand eight hundred and forty-four and one thousand eight hundred and forty-five.

[SEAL.] MICHELTORENA.
PABLO DE LA GUERRA.

TO THE EXCELLENT GOVERNOR: Vicente Gomez, a Mexican by birth and a resident of this capital, appears before you and represents to the justice of your excellency and says, that desiring to devote himself to agriculture, which is of vital importance in this department, he solicits that your excellency will have the goodness to grant him, in ownership, the place known by the name of Panocha Grande, bounded in the north with Don Julian Ursua; on the south with the hills; on the east with the valley of the Tulares, and on the west with Don Francisco Arios; which land is of the extent of three square leagues, more or less, as explained by the map, which will present more correctly than the one now offered with this petition.

Wherefore I pray that your excellency will take into consideration this petition, so that I may obtain the means to support my growing family.

Giving thanks to your excellency, and swearing all that is necessary.

Monterey, March 13, 1844.

VICENTE GOMEZ.

Monterey, March 14, 1844.

18 The secretary of despatch will take the necessary preliminary steps.

MICHELTORENA.

As directed by his excellency the governor, let this be passed to the judge of the first instance of San Juan for his report of what may be just, and returning it to the office of the secretary.

Monterey, 14th of March, 1844.

MANUEL JIMENO.

In pursuance of the supreme order of his excellency, asking for information whether the land asked for is vacant, I report that it is vacant, and there is no reason why it should not be granted.

San Juan, 20 of March, 1844.

JOSÉ ANTONIO RODRIGUEZ.

Filed in office November 3d, 1853.

GEORGE FISHER, *Secretary.*

19 *Opinion of the board.*

VICENTE GOMEZ *vs.* THE UNITED STATES. } Number 569.

Claim for a place called Panocha, containing four square leagues, situate in the county of Monterey.

The petitioner in this case states in his petition that he had a grant for the above-named place issued in the year A. D. 1844 by Governor Micheltorena; and that the grant was among the archives of state at Monterey at the time that the archives fell into the hands of the Americans, in July, 1846, and that it was either lost or destroyed.

He has also given satisfactory proof of the existence and loss of the grant, but has failed entirely to offer any proof whatever going to show that he ever occupied, improved, or cultivated any part of the land, or that any one ever did for him, or that he ever saw the land.

We are therefore of the opinion that the claim is invalid, and a decree rejecting the same will be entered. Rejected.

Filed in office March 6th, 1855.

(Signed) GEO. FISHER, *Secretary.*

Recorded in Record of Decisions, vol. 2, p. 552.

(Signed) GEO. FISHER, *Secretary.*

20 *Decree.*

VICENTE GOMEZ *vs.* THE UNITED STATES. } Number 569.

In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of the petitioner is not valid, and

it is therefore decreed that his application for a confirmation thereof be denied.

ALPHEUS FELCH,
R. AUG. THOMPSON,
S. B. FARWELL,
Commissioners.

Filed in office March 6th, 1855.
(Signed) GEO. FISHER, *Secretary.*

Recorded in Record of Decisions, vol. 2, p. 553.
(Signed) GEO. FISHER, *Secretary.*

And it appearing to the satisfaction of the board that the land hereby adjudicated is situated in the northern district of California, it is hereby ordered that two transcripts of the proceedings, and of the decisions in this case, and the papers and evidence upon which the same are founded, be made out and duly certified by the secretary, one of which transcripts shall be filed with the clerk of the United States district court for the northern district of California, and the other be transmitted to the Attorney General of the United States.

21 OFFICE OF THE BOARD OF COMMISSIONERS TO ASCERTAIN AND SETTLE THE PRIVATE LAND CLAIMS IN THE STATE OF CAL'A.

I, George Fisher, secretary to the board of commissioners to ascertain and settle the private land claims in the State of California, do hereby certify the foregoing twenty pages, numbered from one to twenty, both inclusive, to contain a true, correct, and full transcript of the record of the proceedings and of the decision of the said board, of the documentary evidence and of the testimony of the witnesses, upon which the same is founded, on file in this office, in case No. 569 on the docket of the said board, wherein Vicente Gomez is claimant against the United States, for the place known by the name of "Pinoche Grande."

In testimony whereof, I hereunto set my hand and affix my private seal, (not having a seal of office,) at San Francisco, California, this fifteenth day of August, A. D. 1855, and of the independence of the United States of America the eightieth.

[SEAL.]

GEO. FISHER, *Sec'y.*

22 *Proceedings in northern district.*

Letter from clerk northern district, transmitting transcript, etc., to southern district.

CLERK'S OFFICE, U. S. DISTRICT COURT,
Northern District of California, San Francisco, June 1st, 1857.

SIR: I herewith transmit to you transcript No. 278 in this court, and 569 in the land court, wherein Vicente Gomez is the appellant and claimant of the place called "Panoche Grande," together with all the papers on file in this court in the said case, consisting

of the notice of appeal and affidavits of the claimant, of Manuel Castro, and of J. C. Cambuston, and also certified copy of the order under which the said papers are sent to you. Your receipt for the same is respectfully solicited.

Your obedient servant,

JOHN A. MONROE, *Clerk*,
By W. H. CHEVERS, *Deputy*.

C. SIMS, Esq.,
Cl'k U. S. Dist. Court, Los Angeles.

Filed 4 June, 1857.

A. S. TAYLOR, *Deputy Clerk*.

Affidavits of Manuel Castro and J. C. Cambuston, filed in northern district.

STATE OF CALIFORNIA,
County of San Francisco, ss:

Manuel Castro and Henrique Cambuston, being duly sworn, each for himself deposes and says, that he knows Vicente P. Gomez; that he has heard that said Gomez owns the rancho called "La Panoche Grande," situated in the county of Mariposa or Monterey; that said rancho is in the southern United States judicial district of the State of California, and that he knows of other ranchos situated farther north of the said rancho "La Panoche Grande," the titles to which are being tried in the district court of the United States for the southern judicial district, in the State aforesaid.

MANUEL CASTRO.
H. CAMBUSTON.

Sworn to and subscribed before me this 23d day of February, A. D. 1857, as witness my hand and official seal.

W. F. SWASY, [SEAL.]
Notary Public.

Filed March 2, 1857.

W. H. CHEVERS, *Deputy*.

Filed 4 June, 1857.

A. S. TAYLOR, *Dep'ty Cl'k*.

Notice of appeal filed in northern district.

THE UNITED STATES *vs.* VICENTE GOMEZ. } No. 278.—No. 569 of transcript, for "Panoche Grande."—On appeal from the U. S. land commissioner for Cal'a.

District court of the United States for the northern district of California.

Vicente Gomez, by his attorney, hereby gives notice that it is his intention to prosecute the appeal in the above-entitled cause,

from the decision of the commissioners to ascertain and settle the private land claims in California, rejecting his said claim, the transcript of which was filed in the clerk's office of said district court on the 1st of October, A. D. 1855.

E. O. CROSBY,
Attorney for Appellant.

Filed March 13, 1856.

W. H. CHEVERS, *Deputy.*

Filed 4 June, 1857.

A. S. TAYLOR, *Deputy Clerk.*

District court of the United States, northern district of California.

VICENTE GOMEZ *vs.* THE UNITED STATES. } Claim for the place called "Panoche Grande."—Docket No. 278.—Transcript No. 569.

26 *Affidavits of Gomez as to locality, filed in N. dist.*

UNITED STATES OF AMERICA,
Northern Dist. of California, ss:

Vicente Prefecto Gomez, being duly sworn, deposeth and saith, that he is well acquainted with the tract of land claimed in the case, known by the name "Panoche Grande;" that it lies to the south of and adjoining to the place known by the name of "Real de los Aquilas," and is situated wholly within the southern district of California, and south of the 37th parallel of north latitude.

VICENTE PREFECTO GOMEZ.

Subscribed and sworn before me this 17th June, 1857.

W. H. CHEVERS,
Deputy clerk, U. S. District Court, N. D. of California.

Filed Jan. 19, 1857.

W. H. CHEVERS, *Deputy.*

Filed 4 June, '57

A. S. TAYLOR, *Deputy Clerk.*

27 *Certified copy of order changing venue, from N. to S. Dist.*

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room in the city of San Francisco, on Monday, the ninth day of March, in the year of our Lord one thousand eight hundred and fifty-seven.

Present: Hon. M. H. McAllister, circuit judge; and the Hon. Ogden Hoffman, district judge.

THE UNITED STATES *ads.* VICENTE GOMEZ. } D. C. 278.—D. C. 569.

It being represented to the court that the lands claimed in this case, lie in the southern district of California, now, therefore, on

motion of E. W. F. Sloan, esq., made in open court, ordered by the court that the clerk of this court send to the clerk of the district court for the southern district of California said transcript, together with a certified copy of this order.

Endorsed: Filed March 9th, 1857.

JOHN A. MONROE, *Clerk*,
By W. H. CHEVERS, *Deputy*.

I, John A. Monroe, clerk of the district court of the United States for the northern district of California, do hereby certify the foregoing to be a full, true, and correct copy of the original, now on file and remaining of record in my office.

[SEAL.] In testimony whereof, I have herewith set my hand and affixed the seal of said court this first day of June, A. D. 1857.

JOHN A. MONROE, *Clerk*.
By W. H. CHEVERS, *Deputy*.

Filed 4th June, 1857.

C. SIMS, *Clerk*.
A. S. TAYLOR, *Deputy*.

28 *Proceedings, etc., in southern district.*

VICENTE GOMEZ, appellant,
vs.
THE UNITED STATES, appellee.
} Docket No. 393.—Transcript, No. 569.

29 *Petition for review.*

JUNE TERM, A. D. 1857.

To the Hon. the district court of the United States for the southern district of California, on transfer from U. S. district court, northern district of California:

The petition of Hartman & Sloan, attorneys for Vicente Gomez, or those claiming under said Gomez—

That this case is an appeal from the decision of the board of United States land commissioners to ascertain and settle private land claims in California.

That the land claimed for by your petition is the land described in the expediente, making a part of the evidence, proceedings, pleadings, etc., in the transcript No. 569, of said board of land commissioners above alluded to, together with the accompanying map or diseño, filed and endorsed in said transcript, and that the said land is known as the "Rancho Panoche Grande," and is within the jurisdiction of this honorable court.

That after considering the claim of your petition, and the proofs filed in support thereof, said board, on the 6th day of March, 1855, decided the claim to be invalid.

That a transcript of the record of said proceedings was filed in this court on the 4th day of June, 1857, being transferred by consent of this court, from the district court of the U. S. for the north district of California, and that said transcript record was filed in said northern district court on October the first, 1855, and a notice of appeal filed in said northern district court on 18th March, 1856, by E. O. Crosby, said claimant's attorney.

Your petitioners pray that such decision of said board may be reversed, and that this court may confirm his title to said land.

HARTMAN & SLOAN,
Attorneys for Claimant and those under him.

Filed 4 June, 1857.

A. S. TAYLOR, *Deputy Clerk.*

Summons.

UNITED STATES OF AMERICA,
Southern District of California, ss:

The President of the U. S. to P. Ord, U. S. dist. att'y, greeting:

Take notice, that a petition, a copy of which is herewith served upon you, has been filed against the United States in the district court of the United States in and for the southern district of California, on 4th day of June, in the year of our Lord one thousand eight hundred and fifty-seven, at the city and county of Los Angeles, in said district, by Vicente Gomez, praying said court to review the decision of the U. S. board of commissioners of the 6th March, 1855, rejecting his claim to the lands known by the name of "Rancho Panoche Grande," situate in the southern district of California, and that you are required to appear at said court in said city, within ten days after the service hereof, if served on you within the county of Los Angeles, and within twenty days if served on you in the county of San Diego or San Bernardino, and within forty days if served on you in any other county of said State, exclusive of the day of service, and answer said petition, or that judgment by default will be taken against you, and the prayer of the said petitioner will be granted with costs.

In witness whereof, I have hereto set my hand and affixed the seal of the said court, this 1st day of August, in the year of our [SEAL.] Lord one thousand eight hundred and fifty-seven, at Los Angeles aforesaid.

C. SIMS, *Clerk,*
Pr. J. H. COLEMAN, *Deputy.*

I served this summons, along with the proper copy of the petition, upon C. E. Thorn, acting district attorney at Los Angeles, in the southern district of California, on Monday, the 10th day of August, A. D. 1857.

Sworn to and subscribed before me 12th August, 1857.
J. C. RENNIE, *Marshal.*
C. SIMS, *Clerk,*
P'r J. H. COLEMAN, *Deputy.*

33 Filed 6th day of August, 1857.
C. SIMS, *Clerk,*
P'r J. H. COLEMAN, *Deputy.*

Order to file transcript.—(*See Records.*)

United States district court, south. district, California.—Regular June term, A. D. 1857.

JUNE 4TH, A. D., 1857.

Hon'l Isaac S. K. Ogier, judge.

VICENTE GOMEZ, appellant,
v.
THE UNITED STATES, appellee. } No. 393.

Now, on this day come the parties in this cause—the appellant by Sloan and Hartman, esq's, and the appellees by P. Ord, U. S. district att'y.

Whereupon, on motion of the attorney of appellant, it was ordered, that the transcript and papers transferred from the northern district court be filed in this court, and the petition for review of the same be entered therein, and the claimants have leave to proceed
34 in said cause the same as if originally filed in this court.

Decision of confirmation.—(*Record.*)

United States district court, southern district, California.—Regular June term, A. D. 1857.

JUNE 5TH, A. D. 1857.

Hon. Isaac S. K. Ogier, judge.

VICENTE GOMEZ, appellant,
vs.
THE UNITED STATES, appellee. } No. 393.

Now, on this day, this cause coming on to be heard, the parties appearing by their respective attorneys, the appellant by Sloan and Hartman, esq's, and the appellee by P. Ord, U. S. district attorney, and after argument of counsel aforesaid the same is submitted to the court for final adjudication.

Whereupon the court, being fully advised in the premises, delivered its opinion, confirming the claim of the appellant to the extent called for in the transcript and papers, three leagues of sitios
35 de ganado mayor, and a decree was ordered to be entered up in conformity to said opinion.

Decree filed Jan. 7, 1858, as of June 5, 1857.

In the district court of the United States, southern district of California.

VICENTE P. GOMEZ, appellant, *vs.* THE UNITED STATES, appellee. } Case No. 393.—"Panoche Grande." Trans. 569.

This cause coming on to be heard, on appeal from the decision of the United States board of land commissioners to ascertain and settle the private land claims in the State of California, under the act of Congress approved March 3d, 1851, on a transcript of the decision and proceedings of said board, and the papers and evidence upon which said decision was founded, and the other evidence adduced by the appellant before this court, and it appearing to the court that said transcript and the notice of appeal have been duly filed according to law, and counsel for respective parties having been heard,

36 it is ordered, adjudged and decreed that the decision of said board of land commissioners be, and the same is hereby, reversed, and that the claim of appellant is good and valid, and the same is hereby confirmed to him as follows, to wit: Three leagues of land, more or less, situate in the county of Monterey, State of California, bounded on the north by lands of Julian Ursura, on the south by the hills, on the east by the valley of the Tulares, and on the west by the lands of Francisco Arias, as is more fully set forth and described by the title issued for the same, and the diseño accompanying the same.

And it appearing to the court that on the 5th day of June, A. D. 1857, the lands in this case described had been confirmed by the court to said claimant and appellant, and it having been omitted to sign and enter a decree therefor at the date last aforesaid, it is ordered that the same be done now for then.

ISAAC S. K. OGIER,
U. S. District Judge.

37 Filed this 7th day of January, A. D. 1858, *nunc pro tunc* 5th June, A. D. 1857.

C. SIMS, *Clerk*,
P'r J. H. COLEMAN, *Deputy.*

Order to amend and sub-decree.—(Record.)

United States district court, southern district of California—regular December term, 1857.

FEBRUARY 4TH, A. D. 1858.

Hon. Isaac S. K. Ogier, judge.

VICENTE GOMEZ, appellant, *vs.* THE UNITED STATES, appellee. } No. 393.—"Panoche Grande."

On motion of Sloan and Hartman it is ordered that the appellant have leave to amend the decree filed in this case by substituting another in its stead.

In the district court of the United States, southern district of California.

38 *Decree filed Feb.* 5, '58, *as of June* 5, '57.

VICENTE P. GOMEZ, appellant, *als.* THE UNITED STATES, appellees. } Case No. 393.—"Panoche Grande." Transcript No. 569.

This cause came on to be heard on appeal from the decision of the United States board of land commissioners to ascertain and settle the private land claims in the State of California, under an act of Congress approved March 3, 1851, on a transcript of the decision and proceedings of said board, and the papers and evidence upon which said decision was made, and the other evidence adduced by the appellant before this court; and it appearing to the court that said transcript and notice of intention to appeal have been duly filed according to law, and counsel for the respective parties having been heard, it is ordered, adjudged, and decreed, that decision of said board of land commissioners be, and the same is hereby,
39 reversed, and that the claim of said appellant is good and valid, and the same is hereby confirmed to him as follows, to wit: the tract of land, situate in the county of Fresno, State of California, known by the name of "Panoche Grande," bounded northerly by the lands of Don Julian Ursura; southerly by the hills; easterly by the valley of the Tulares, and westerly by the lands of Don Francisco Arias, containing four square leagues of land and no more; provided that quantity is contained within the boundaries aforesaid; that confirmation of such less quantity is hereby made to said claimant, and for a more particular description of which said land, reference is hereby made to the map contained in the transcript in this case; and it also appearing to this court that heretofore, to wit, on the 5th day of June, A. D. 1857, at a regular term of this court, holden in the town of Monterey, State of California, the claim of the appellant in this case had been confirmed by this court, but that it had been omitted by the court to sign the decree of confirma-
40 tion at the time the same was made. It is therefore further ordered by this court that the same be signed now as for then.

Given under my hand, in open court, 5th day of February, A. D. 1858.

ISAAC S. K. OGIER,
U. S. Dist. Judge for the S. District of California.

Filed this 5th February, 1858, for the 5th June, 1857.
C. SIMS, *Clerk.*
P'r J. H. COLEMAN, *Deputy.*

Motion to open decree.

United States of America, southern district of California.

VICENTE GOMEZ *vs.* THE UNITED STATES. } Appeal from the land commissioners, No.——, for Panoche Grande.

And now comes the United States, by Edwin M. Stanton, her special counsel in that behalf, and moves the court to open
41 the decree and reinstate it upon the docket, with leave to take testimony on behalf of the United States, for the following reasons:

1st. That the said decree was improvidentally entered.

2d. That new evidence has been discovered material to the United States, to show that the said claim is fraudulent and invalid.

EDWIN M. STANTON
Counsel for the United States.

Filed 7th July, 1858.

C. SIMS, *Clerk*,
P'r J. H. COLEMAN, *Deputy*.

Rough draft of motion for appeal filed in clerk's office.

In the district court of the United States for the southern district of California.—December term, 1857.

LOS ANGELES.

On motion of P. Ord, attorney of the U. S. for the southern district of California, it is ordered by the court that appeals to the Supreme Court of the United States be allowed the United
42 States in the following causes, viz:

No. 20. Anastacio *vs.* The United States, deci'd Jan. 12, 1857.
No. 153. Manuel Anguisola *vs.* The United States, deci'd Feb. 20, 1857.
No. 288. Wm. S. Johnson *et al. vs.* The United States, deci'd Feb. 7, 1857.
No. 187. Leander Ransom *vs.* The United States, deci'd June 2, 1857.
No. 274. Thomas Coal *vs.* The United States, deci'd June 6, 1857.
No. 393. Vicente Gomez *vs.* The United States, deci'd June 5, 1857.
No. 231. Valentine Cota et al *vs.* The United States, deci'd June 4, 1857.

Filed this 15th March, 1858.

C. SIMS, *Cl'k*,
P'r J. H. COLEMAN, *Deputy*.

Motion for appeal and taken under advis't by court.—(Record.)

United States district court southern district, California.—Regular December term, 1857.—March 15th, 1858.—Hon. Isaac S. K. Ogier, judge.

On motion of E. J. C. Kervin, acting U. S. district attorney, for leave to take appeals in the following cases, to wit:

Nos. 20, 153, 187, 231, 274, 288, and 393, the same is taken under advisement.

43 *Motion for and order withdrawing motion for appeal.—(Record.)*

United States district southern district, California.—December term, A. D. 1858.—December 7th, A. D. 1858.—Hon. Isaac S. K. Ogier, judge.

Now on this day comes J. R. Gitchell, U. S. district attorney, and moves the court to withdraw the motion heretofore made and filed to appeal the cases Nos. 20, 153, 187, 231, 274, 288, and 393.

Which motion being heard by the court is granted, and the said motion heretofore filed is, and the same is hereby, withdrawn.

United States district court southern district, California.—Regular December term, 1858.—May 4th, A. D. 1859.—Hon. Isaac S. K. Ogier, judge.

44 *Sub. of motion for leave to file mandate, &c.—(Record.)*

VICENTE P. GOMEZ, appl't,
vs.
THE UNITED STATES, appellee. } No. 393.

Now on this day comes the parties aforesaid, the appellant appearing by J. L. Brent, his attorney, and the appellee by J. R. Gitchell, U. S. district attorney.

Whereupon counsel for appellant moves the court for leave to file the mandate of the Supreme Court in this cause, and for an order to proceed under the decree of this court heretofore rendered in his favor as under a final decree, which motion, after argument of counsel is continued for further argument till Monday, the 9th day of May, A. D. 1859.

United States district court, southern district of California.—Regular December term, 1858.—May 9th, 1859.—Hon. S. K. Ogier, judge.

45 *Continuance.—(Record.)*

VICENTE P. GOMEZ
vs.
THE UNITED STATES. } 393.

Case No. 393, by consent of parties, is indefinitely continued.

Sub. of att'ys.—(Record.)

United States district court, southern district of California.—Called term, A. D. 1859.—Nov. 7th, A. D. 1859.

VICENTE GOMEZ
vs.
THE UNITED STATES. } No. 393.

On motion of E. W. Taylor, esq., it is ordered by the court that Shafters, Park, and Heydenfeldt, and E. W. Taylor, esq., be substituted as attorney of record in the above-entitled cause.

46 *Order setting motions for argument.*

V. P. GOMEZ
vs.
THE UNITED STATES. } No. 393.

On motion of E. W. Taylor, of counsel for claimant, and on consent of J. R. Gitchell, esq., United States district attorney, it is ordered, that the motion in this case heretofore and now pending, that the decree in this case be opened, and for leave to introduce new evidence; and also the motion heretofore made by claimant and now pending for leave to file the mandate of the Supreme Court of the United States, and for an order to proceed under the decree heretofore rendered in this case as under a final decree, be, and they are hereby, set down for argument, and for final submission to the court on Monday, the ninth day of January, 1860.

ISAAC S. K. OGIER,
U. S. District Judge.

Filed in office this 8th Nov., 1859.

C. SIMS, *Cl'k.*

47 *Motion for continuance overruled.—(Record.)*

United States district court, southern district of California.—December term, 1859.—December 7th, 1859.—Hon. S. K. Ogier, judge.

VICENTE P. GOMEZ
vs.
THE UNITED STATES. } No. 393.

Now on this day comes the United States, by her special attorney, the attorneys for claimant not being present, and moves the court to continue this cause till the next term of this court.

Which motion, being heard by the court, is overruled.

Motion of dist. att'y for leave to file copies of missing doc'ts

United States district court, southern district of California.

VICENTE GOMEZ
vs.
THE UNITED STATES. } No. 393.—"Panoche Grande."

Now comes J. R. Gitchell, U. S. attorney for the southern district of California, and suggests to the court that a part of the files
48 in this case have been lost, to wit, a motion filed by the government on the 7th December, 1858, to open decree and reinstate cause, together with the affidavit upon with said motion was founded, and moves the court for leave to file copies of said motion and affidavit.

Filed in office this the 10th January, 1860.

Order granting leave to file new motion and affidavit.—(Record.)

U. S. district court, southern district of California.—Regular December term, A. D. 1859.—January 10th, A. D. 1860.

VICENTE P. GOMEZ.
vs.
THE UNITED STATES. } No. 393.

Now on this day comes the United States district attorney, the counsel of claimant consenting, and moves the court for leave to file his motion for a rehearing and affidavit heretofore filed, and now missing from the record, which motion being heard is by the court granted.

49 *Motion of dist. att'y to open decree.*

United States district court, southern district California.

VICENTE GOMEZ
vs.
THE UNITED STATES. } No. 393.—"Panoche Grande."

Now comes J. R. Gitchell, United States district attorney for the southern district of California, and moves the court to open the decree heretofore entered in this cause, and reinstate the same upon the docket, with leave to take further testimony.

And for cause assigns the following reasons, to wit:

1st. That the said decree was improvidentally entered.

2d. That new evidence has been discovered, material to the United States, to show that said claim was fraudulent and invalid.

3d. That said decree was procured to be entered through fraud.

J. R. GITCHELL,
U. S. Dist. Att'y for Southern Dist. of Cal.

50 *Affidavit of district attorney for a rehearing.*

In the district court of the United States, southern district of Cal'a.

VICENTE P. GOMEZ
vs.
THE UNITED STATES. } Case No. 393.—"Panoche Grande."

J. R. Gitchell, U. S. district attorney for the southern district of California, being duly sworn, says that since the trial and confirmation in this case he has been informed, and believes, that the pretended grant in this cause is false and fraudulent, and that no such grant ever issued, and that there is no evidence in the archives in the office of the surveyor general of the U. S. for the State of California showing that any such grant had ever been issued; and further, that the confirmation of this claim in this court was procured by fraud in this: that at the time of the trial in this court Pacificus Ord, the then district attorney for the United States for the southern district
51 of California, was the owner in fee of two leagues of the land claimed in this case, deriving his interest from the said claimant, Vicente Gomez, by a proper deed of conveyance; that upon said trial said Ord made no opposition to the confirmation of said claim, but appeared on behalf of the United States and assented in open court to the entering of the decree therein; and further affiant saith not.

J. R. GITCHELL.

Sworn to and subscribed before me this 11th day of January, A. D. 1863.

C. SIMS,
Cl'k U. S. District Court for Southern Dist. of Cal.

Filed in office this 11th January, A. D. 1860, as of December 7th, 1858.

C. SIMS, *Cl'k.*

Motion for continuance.

U. S. district court, southern district of California.

VICENTE P. GOMEZ
vs.
THE UNITED STATES, } No. 393.

52 Now comes J. R. Gitchell, U. S. district attorney, and moves the court for a continuance of this cause until the next regular term of this court, for cause assigned in the annexed affidavit.

J. R. GITCHELL.
U. S. District Attorney.

J. R. Gitchell, being duly sworn, says that he cannot safely proceed in the trial of this cause without a proper copy of the records of the county of Monterey, State of California, showing the deed of con-

veyance from Vicente P. Gomez, the claimant in this cause, to Pacificus Ord, late U. S. district attorney for the southern district of California, for two leagues of the land claimed in the cause; that said copy of the record was in Los Angeles at the commencement of this term in the possession of J. Hartman, esq.; that affiant has only learned since the arrival of the steamer on the 7th inst. that
53 said copy of the deed is not now in the possession of said Hartman, esq.

Affiant further says, that he failed to procure a certified copy of said record, believing that this cause would be tried principally by counsel specially appointed in this cause; that since the opening of this court and represented himself to affiant as specially employed by the government to prosecute this cause, and believing such to be the case affiant trusted the preparation of this cause to said Gould.

And further, if this cause is continued until next term, will be able to procure said records; and further affiant saith not.

J. R. GITCHELL.

Sworn and subscribed to before me this the 11th day of January, A. D. 1860.

C. SIMS,
U. S. Dist. Cl'k, Southern Dist. Cal'a.

Filed 11th January, A. D. 1860.

C. SIMS, *Clerk.*

54 *Motion of I. Hartman to be stricken from the record as attorney.*

In the district court of the United States southern district of California.

THE UNITED STATES, appellees. *vs.* VICENTE P. GOMEZ, appellants, } Case No. 393, D.C.—"Panoche Grande"—In L. C. No. .

Now comes Isaac Hartman, and in behalf of himself and E. W. F. Sloan moves the court to strike the names of Hartman and Sloan from off the petition for review in this case, purporting to have been filed in the cause, as of the date of June 4, 1857, for the following causes to wit:

1st. Because the said petition for review was never written, signed, and filed by said Sloan and Hartman, or either of them, nor by any other person for them with their consent.

2d. Because the said Sloan and Hartman, nor either of them, have ever been the attorneys for the claimant and appellant in the above-entitled cause.

ISAAC HARTMAN,
For self and E. W. F. SLOAN.

Filed in office this 11th January, 1860.

C. SIMS, *Cl'k.*

55 *Affidavit of I. Hartman.*

In the district court of the U. S. southern district of California.

THE UNITED STATES *vs.* VICENTE P. GOMEZ. } Case No. 393—"Panoche Grande."

Isaac Hartman, being duly sworn, upon his oath says, that about the month of September or October, A. D. 1859, Daniel Gibb, esq., of the city of San Francisco, a copy of a deed from Vicente P. Gomez to Pacificus Ord, esq., for two leagues of land in the above claim, certified to by the recorder of the county of Monterey, requesting affiant to deliver the same to J. R. Gitchell, esq., U. S. district attorney for the southern district of California, affiant brought said copy of deed with him to Los Angeles, and had it in his possession in the month of December, when E. L. Goold, esq., arrived in Los Angeles, some time in the same month, representing himself to be specially employed in this case on behalf of the United States.

56 Said Goold requested this affiant to deliver the aforesaid copy of deed to him. Affiant refused to do so, stating to said Goold, that he had given his receipt to Daniel Gibb, esq., for the same, and that he would deliver it to the said Gitchell or return it to the said Gibb, said Goold suggested that affiant return it to said Gibb, which affiant afterward did in the city of San Francisco, somewhere about the 15th day of December aforesaid, receiving back his receipt therefor. Affiant further states that he has since been informed by said Gibb that he delivered said certified copy of deed to said Goold, and that said Goold has carried the same with him to the city of Washington. Affiant also states that at the time he had said certified copy of deed in his possession he informed said Gitchell of that fact, and that he was ready to deliver it to him at any time. This was before said Goold requested the same of affiant.

And further affiant saith not.

ISAAC HARTMAN.

57 Sworn to and subscribed before me this 11th day of January, A. D. 1860.

C. SIMS,
Cl'k U. S. Dist. Court, Southern District Cal'a.

Filed in office this 11th January, A. D. 1860.

C. SIMS, *Clerk.*

Affidavit of Isaac Hartman.

In the district court of the United States southern district of California.

THE UNITED STATES, appellees, *vs.* VICENTE P. GOMEZ, appellants. } Case No. 393.—"Panoche Grande." In L. C. No. .

Isaac Hartman, being duly sworn, upon his oath says, that whilst in attendance upon the court at its June term, A. D. 1857, at Mon-

terey, in said district, Pacificus Ord, esq., then U. S. district attorney for said district, asked this affiant to present this cause
58 to the court for confirmation on behalf of claimant, stating that there was no objection to a confirmation on the part of the United States. Affiant not suspecting there could be anything wrong about a claim to which the government made no opposition, consented to present the case to the court. On the same day this conversation took place, and whilst this affiant was sitting at the bar table in the court-house, the court then being in session, the said Ord passed to this affiant the transcript in this cause, requesting him to read it to the court; affiant did as requested without further remark.

After affiant finished reading, said Ord remarked to the court that was no opposition on the part of the government to a confirmation. Whereupon the court replied that there being no objection, the claim would be confirmed as a matter of course.

Affiant paid no further attention to the case at the time.
59 At the ensuing December term of said court at Los Angeles, the said Ord remarked to this affiant, that it was omitted at the time of the confirmation of said claim as aforesaid, to have the decree therein signed by the judge and enrolled, and requested affiant to draw up a decree, and present it to the judge to sign *nunc pro tunc.*

Affiant again did as requested, but he states that he did not know or suspect, at the several periods aforesaid, nor until some time after the last-mentioned period that said claim was fraudulent, and that the said Pacificus Ord had an interest therein at the time of trial and confirmation of two square leagues of the same. Affiant learned that such was the fact not until some time in the summer of the year A. D. 1858, when the same was communicated to him by either Edwin M. Stanton, E. L. Goold, or Daniel Gibb, esq's.

Affiant further says, that on examining the files in this case,
60 some time in the month of November, A. D. 1859, he, for the first time, discovered on file a petition to review the decision of the late board of land commissioners. This petition is filed as of the 4th day of June, A. D. 1857, and bears the signature "Hartman and Sloan" as attorneys of claimant. Affiant says, that at the date of the filing of this petition, a partnership did exist between the said E. W. Sloan and this affiant in the practice of law, the firm, name, and style being Sloan and Hartman, and never was signed otherwise by them, or either of them. Affiant says, that neither the body of said petition, or the signature thereto, is in the handwriting of affiant or the said E. W. F. Sloan, or of any clerk or person in their employ; nor did this affiant ever authorize any person to write, sign,
61 and file said petition; and he is informed by said Sloan and believes the same to be true, that he, the said Sloan, never knew or heard of the said petition until a few days since, when this affiant called the attention of the said Sloan thereto by inquiry. Affiant says he has no knowledge who wrote and caused said petition to be filed, nor by whose authority and direction the same was done; that

he has never been the attorney of the appellant in this cause, except as herein stated. That he has never rendered any service therein except upon the request of the said Pacificus Ord, and that he has never received any fee or reward for such service, either directly or indirectly. and that at the time of the presentation of said case to the district court aforesaid he was utterly ignorant as to the real parties in interest in said claim, as informed by the record.

ISAAC HARTMAN.

Sworn and subscribed to before me this 11th day of January, A. D. 1860.

62 C. SIMS,
Cl'k U. S. Dist. Court, Southern Dist. of Cal'a.

Filed in office the 11th January, 1860.

C. SIMS, *Clerk.*

Stipulation that claimant conveyed to Ord that deed may be evidence, &c.

VICENTE P. GOMEZ, *vs.* THE UNITED STATES. } "Panoche Grande."—No. 393.

It is admitted, upon the part of the claimant, that the said claimant conveyed by deed to Pacificus Ord, formerly district attorney, two leagues of the land claimed in the case previous to the confirmation thereof.

And it is further stipulated that a copy of said deed may be placed on record when procured, and considered as evidence in this cause.

SHAFTERS, PARK, and HEYDENFELDT,
Attorneys for Claimants.
J. R. GITCHELL,
U. S. District Attorney.

Filed in office this 11th Jan'y, 1860.

C. SIMS, *Cl'k.*

Minutes of proceedings—motion for continuance argued and continued.—(Record.)

63 United States District court, southern district, California. — Regular December term, 1859.

JANUARY 11TH, 1860.

Hon. Isaac S. K. Ogier, judge.

VICENTE GOMEZ *vs.* THE UNITED STATES. } No. 393.

Now, on this day come the parties aforesaid, by their attorneys aforesaid. Whereupon J. R. Gitchell, U. S. district attorney, moves the court for a continuance of the motions heretofore filed, to wit, the motion of claimant to file the mandate of the Supreme Court on ap-

peal, for leave to proceed under the decree of this court, and the motion to continue the motion made on the part of the government for a rehearing of this cause, and reads his own affidavit in support of said motion of continuance and during the arguments of
64 counsels—the counsel of claimant offering to admit the facts set forth in the affidavit, to wit, that P. Ord, the late U. S. district attorney, was the owner of two leagues, covered by the decree, by a conveyance from the claimant before the decree was entered, and a stipulation to that effect having been entered into by the respective counsels, and the facts thus admitted being considered as in evidence, together with the affidavit of I. Hartman, esq., the argument of said motion continued.

Whereupon, after argument of counsel, the court adjourns the further hearing till Friday, the 13th inst.

Minutes of proceedings—motions continued to procure testimony of E. W. F. Sloan.—(Record.)

United States district court, southern district, California.—Regular December term, 1859.

JANUARY 14TH, A. D. 1860.

Hon. Isaac S. K. Ogier, judge.

VICENTE GOMEZ *vs.* THE UNITED STATES. } No. 393.

65 Now, on this day, being the day for the further hearing of this cause, come the parties by their respective attorneys. Whereupon the court proceeds to deliver its opinion upon the motion for leave to file the mandate of the Supreme Court, and for leave to proceed, under the decree of this court, as under a final decree, rejecting and overruling the same.

Whereupon the motion for rehearing heretofore filed coming up for hearing, and after argument of counsel, the court overrules the motion for a continuance of the U. S. district attorneys, and it being suggested to the court by the affidavit of Isaac Hartman, that the petition for a review of the decision of the board of land commissioners, and purporting to be signed by Hartman & Sloan, as attorneys for the claimant, was not so signed by them in fact, or author-
66 ized to be so signed by them; and it appearing that the answer filed in said cause, by the district attorney of the United States, is missing from the files, and it appearing also that at the time the decree of this court was entered in said cause, that the late district attorney, Pacificus Ord, was interested in said claim, the court, upon its own motion, ordered that this cause be continued for the purpose of procuring the testimony of E. W. F. Sloan, to be used on the further hearing of said motion, to which order the counsel of claimant excepted, on the ground that the court had no jurisdiction over the motion except to dismiss it.

Order for commissioner to take testimony of Sloan.—(Record.)

United States district court, southern district California.—Regular December term, 1859.

JANUARY 18TH, 1860.

Hon. Isaac S. K. Ogier, judge.

65 V. P. GOMEZ *vs.* THE UNITED STATES. } No. 393.

Ordered by the court that the clerk of this court issue a commission, with the petition of review attached thereto, signed by Hartman and Sloan, as attorneys for claimants, to John B. Williams, commissioner, to take the testimony of E. W. F. Sloan, to be used on the further hearing of said motion.

Order surceasing proceedings.—(Record.)

United States district court, southern district of California.—Regular December term, A. D. 1859.

MARCH 20TH, A. D. 1860.

Hon. Isaac S. K. Ogier, judge.

VICENTE P. GOMEZ *vs.* THE UNITED STATES. } No. 393.

66 Ordered by the court that all proceedings in the above cause be surceased until after the decision of the Supreme Court is rendered in the same.

Order of Judge Ogier for trial de novo.—(Record.)

United States district court, southern district California.—Regular December term, 1860.

MARCH 21ST, A. D. 1861.

Hon. Isaac S. K. Ogier, judge.

VICENTE P. GOMEZ *vs.* THE UNITED STATES. } No. 393.

Whereas it has come to the knowledge of this court that a decree heretofore rendered by this court in this case was fraudulently obtained by misrepresentation of the then dist. attorney, P. Ord, and other counsel in the case, and it appearing to the satisfaction of the court, from testimony on record in the case, that the then district attorney, counsel for the United States, was, at the time of
67 making said decree, interested in the land claimed in said

cause adversely to the United States, and representing to the court that there was no objection to the confirmation of the claim aforesaid on the part of the United States, a decree was entered without an examination by the court into the merits of said claim, thus deceiving the court, and obtaining a decree in his own favor under the false pretence of representing the interest of the United States.

It is therefore ordered that all proceedings heretofore had in said cause be set aside, and the cause be put on the calendar, and set for trial *de novo* according to law.

Leave to take testimony.—(*Record.*)

United States district court, southern district of California.—Regular December term, A. D. 1860.

MARCH 27TH, 1861.

Hon. Isaac S. K. Ogier, judge.

68 VICENTE GOMEZ *vs.* THE UNITED STATES. } No. 393.

On motion and application of U. S. district attorney, leave is granted to take testimony under the rules of the court.

Dep. of Boronda, drawn up by E. L. Goold, as to the extent of his ignorance

District court of the United States for the southern dist. of Cal'a.

VICENTE P. GOMEZ *vs.* THE UNITED STATES.

The testimony of José Canuto Boronda, a witness on behalf of the United States.

I was born in California, near the presidio of San Francisco, and am sixty-six years of age. I have always lived in California, and have resided in San Juan since 1835. The land in the vicinity of San Juan I know well—as well as the former owners; but I am not acquainted with all the persons there now, as there are so many foreigners. I know the lands of Don Julian Ursura, and those
69 of Don Francisco Arias. I know La Ferrania, and also the valley of the Tulares. I know a river in that vicinity called "Panoche." I know of no land by the name of Panoche. The name of that river, "Panoche Grande," refers to a river, and there is a small river called "Panoche Chica." I have lived within twenty leagues of this neighborhood since 1835. I know the father of Vicente Gomez very well. I have known Vicente for the last ten years, and I never heard of his having any grant of land there. I have never heard of any concession made in that neighborhood but

that of Arias and that of Ursura. Under the Mexican government there were no persons settled in that neighborhood except those two families.

Cross-examination waived.

JOSE CANUTO BORONDA.

Subscribed and sworn to before me this 30th day of May, A. D. 1861.

T. J. THIBAULT,
Notary Public, City and County of San Francisco.

70 It is hereby stipulated that the foregoing deposition may be read in evidence upon the trial of this cause, subject to all objections to the substance thereof, all objections to the form and manner of taking the same are hereby waived.

SHAFTER and HEYDENFELDT,
For Plaintiff.

E. L. GOOLD,
Special Counsel of the U. S.

Filed June 11, 1861.

G. L. MIX, *Clerk.*

Continuance of motion.—(Record.)

United States district court, southern district California.—Regular December term, A. D. 1861.—December 2d, 1861.—Hon. Fletcher M. Haight, judge.

VICENTE GOMEZ, appellee, *ads.* THE UNITED STATES, appellant. } No. 393.

71 It is ordered that, on account of the absence of the U. S. dist. att'y, all motions pending in this cause before this court be, and the same are hereby, continued until the next term of said court.

Stip. of continuance.

In the district court of the United States for the southern dist. of Cal'a.

VICENTE P. GOMEZ, app'l't, *v.* THE UNITED STATES, app'ee. } No. 393.

It is hereby stipulated that the above-entitled cause be continued to the Dec. term, 1861, from the June term, 1861.

May 22d, 1861.

J. R. GITCHELL,
U. S. Dist. Att'y.

Filed Oct. 29, 1861.

G. L. MIX, *Clerk.*

Letter.—Shafter to U. S. dist. cl'k.

SAN FRANCISCO, *Nov. 30th*, 1861.

DEAR SIR: We are attorneys for the claimant in the case of the "Panoche Grande," The United States *vs.* Gomez.

There is a motion pending to set aside an order made by
72 Judge Ogier, granting a new trial. The claimant is the moving party, and the motion, I suppose, is ripe for a hearing. As it is entirely unknown whether an attorney has been appointed for the southern district, I have concluded that it would be improvident for me to make a long and, probably, bootless journey to Los Angeles with a view to a hearing at the coming December term of the district court, in which the cause is pending. If, however, the motion should be brought on by any one having authority to do it, and the case cannot be continued to the June term, 1862, I would wish that an order might be entered allowing us to file a brief for the claimant in, say, 60 days. In the event that the case should be pressed to hearing on the motion, will you please exhibit this letter to the court in support of the application above-named? Perhaps some one of our brethren would oblige us so far as to make the
73 application in our behalf. Will you please write me concerning the matter as soon as it shall have been disposed of?

I sent the moving papers some time since to Mr. Gitchell, with a request that he should serve them upon the district attorney and file them in your office.

Will you please advise me if they are on file now, and have been regularly served?

Yours, very respectfully,

O. L. SHAFTER for
SHAFTER and HYDENFELDT.

Filed December 11, 1861.

74 *Stip. for continuance.*

In the district court of the United States, southern district.

THE UNITED STATES }
vs. }
VICENTE P. GOMEZ. }

It is hereby stipulated that the above-entitled cause be continued to the regular term of said court, to be held at Monterey on the first Monday in June, 1862, then to be heard on a pending motion to vacate an order granting a new trial in said action.

Jan'y 20th, 1862.

SHAFTER & HEYDENFELDT,
Attorneys for claimant.
E. L. GOOLD,
Special counsel of the U. S.

Filed January 20th, 1862.

JOHN O. WHEELER, *Clerk.*

75 *Notice that motion to vacate order for new trial will be heard.*

In the dist. court of the United States for the southern district of Cala.

VICENTE P. GOMEZ, appellant,
vs.
THE UNITED STATES, appellee. } No. 393.

To the district attorney for the southern dist. of California:

SIR: Please to take notice that the claimant in the above-entitled proceeding will, on the first Monday of December, 1861, or as soon thereafter as a successor to Judge Ogier shall have been appointed and qualified, move the said court to vacate the order heretofore entered in said proceeding in March, 1861, granting a new trial to the said United States.

The said motion will be based upon the affidavit hereunto annexed, and the exhibit referred to therein, and the files and record in the case.

May 31, 1861.

SHAFTER, PARK & HEYDENFELDT.
Attorneys for claimant.

76 *Affidavit of Shafter annexed to notice afor.*

In the dist. court of the United States for the southern district of California.

VICENTE P. GOMEZ
vs.
THE UNITED STATES. } No. 393.

I, O. L. Shafter, of lawful age, depose and say that I am one of the attorneys and counsel of the claimant in the above-entitled proceeding, and that as such I, in the months of October or early in November, 1860, addressed a letter to J. R. Gitchell, esq., then the district attorney for said district, requesting him to consent that the hearing on the motion for new trial pending in said case might be postponed and the case continued from the then ensuing December term of said district court, to the June term thereof, 1861.

That in reply to said application I received, about the 20th of Nov., 1861, a letter from Mr. Gitchell, an exact copy whereof is hereunto annexed marked A.

That relying upon the state of things disclosed in said letter,
77 I took it as settled that no action could or would be taken in said proceedings at the said Dec. term, 1860, and did not consider that under the circumstances it would be judicious or proper for me to make a journey to Los Angeles from San Francisco for the purpose of attending to the motion.

I further state, I was first informed about the 20th of May, 1861,

that the court had granted the said motion for new trial late in said December term, and on its own motion.

I further state, that from what, on full examination, I believe to be the facts of the case, there are, in my opinion, meritorious and tenable grounds upon which the said motion for new trial can be resisted should the order granting the same be vacated and the motion be re-opened for hearing.

O. L. SHAFTER.

78 *Stipulation.*

In the district court of the United States for the southern district of California.

VICENTE GOMEZ
v.
THE UNITED STATES.

MONTEREY, *June 13th, A. D.* 1862.

Whereas an affidavit of O. L. Shafter regularly sworn to, of which the within statement of Mr. O. L. Shafter, in his own handwriting, is substantially a copy, and also a notice regularly served on J. R. Gitchell, U. S. district attorney of said southern district, of which the annexed notice is substantially a copy, and also a copy of a letter from said Gitchell to said Shafter, of which the annexed letter is the original, were regularly served and filed in said cause, on the 31st of May, 1861, and whereas the same have been mislaid. Now it is stipulated and agreed that the annexed notice, statement, and letter may be filed and used in said cause, with like force and effect, and in lieu and stead of those that are mislaid.

SHARP & SHAFTER, *for Claimant*,
Per SHARP.
E. L. GOLD, *Special Counsel U. S.*
B. C. WHITING, *U. S. Attorney.*

79 *Letter from district att'y to claimant's att'y.*

U. S. ATTORNEY'S OFFICE,
Los Angeles, Nov. 15, 1860.

GENTLEMEN: Yours of the 10th inst. has been received. In the case of the Panoche Grande no mandate has yet been returned from the Supreme Court, and for all this court officially knows the case is still pending above.

No action can be taken on motion for new trial until return of proceedings of Supreme Court.

Yours truly,

J. R. GITCHELL.

SHAFTER & HEYDENFELDT.

Filed June 3, 1862.

JOHN O. WHEELER, *Clerk.*

80 *Order of S. Court revoking mandate.*

Supreme Court of the United States.—December term, 1859.

Appeal from the district court of the United States for the southern District of California.

THE UNITED STATES, app'lt,
vs.
VICENTE P. GOMEZ. } 299 of D. T., 1858.

On consideration of the motion made in this cause on a prior day of the present term, to wit, on Friday, the 27th day of January, A. D. 1860, by Mr. Attorney General Black, to receive the order and decree of this court of the 31st day of January, 1859, docketing and dismissing this appeal, and to revoke and cancel the mandate issued by this court to the district court of the United States for the southern district of California, and of the arguments of counsel thereupon had, as well in support of as against the said motion. It is now here ordered by this court that the aforesaid decree of this court,
docketing and dismissing this appeal be, and the same is
81 hereby, rescinded and annulled, and that the mandate issued by this court to the district court of the United States for the southern district of California in this case be, and the same is hereby, revoked and cancelled; and it is further ordered by this court that the clerk of this court do forthwith send a certified copy of this order to the aforesaid district court of the United States for the southern district of California.

Per Mr. JUS. WAYNE.

I, William Thomas Carroll, clerk of the Supreme Court of the United States, do hereby certify that the preceding two pages contain a true copy of the order made by the said Supreme Court in the case of the United States, appellants, *vs.* Vicente Gomez, at December term, A. D. 1859, as the same remains on the records of the said Supreme Court.

In testimony whereof, I hereunto subscribe my name and affix the
[SEAL.] seal of said Supreme Court at the city of Washington, this 23d day of October, A. D. 1860.

82 WM. THOMAS CARROLL,
Clerk U. S. Supreme Court.

Filed June 13th, 1862.

JOHN O. WHEELER, *Clerk.*

Minutes of proceedings.—Argument of motion to vacat—*(Record.)*
de novo.—(Record.)

United States district court, southern district C[a]lifornia.—Regu-
June term, A. D. 1862.—June 13th, 1862.— D. 1862.—Hon.
Haight, judge.

VICENTE P. GOMEZ, appellant,
vs.
THE UNITED STATES, appellees. } No. 393.

Now on this day come the parties, by their res[pec]tney, it is ordered
the United States represented by the U. S. district Supreme Court of
by E. L. Goold, esq., and claimants by Geo. F. Sl[ade] this court confirm-
sel, whereupon the hearing of the argumen[t]
83 motion heretofore made, for vacating the o[rder]
made on the 21st March, 1861, setting as[ide]
herein, and reinstating this cause for trial *de nov[o]*
ants file "certified copy of order," made in the Sup[reme]
the U. S., at its Dec. term, 1859, directing that
this court be surceased, etc." Whereupon said m[otion]
counsel and submitted, and leave granted parties

Decision of court vacating order for new trial.[re, to wit, on the
is cause, and the
United States district court, southern district C[a]to set aside said
June term, A. D. 1862.—August 4th, A. D. 18[61] transcript herein
M. Haight, judge. il the next term of
e claimant an op-

VICENTE P. GOMEZ, app'l't, } D. C., No. 393.—
vs. " Panoch[e]
THE UNITED STATES, app'lee. } TING,

84 On this, court delivers its o[pin]*et of California.*
granting the motion heretofore made by th[e]
praying the court to vacate and set aside the order
Ogier, late judge, granting a new trial on this cau[se] EELER, *Clerk.*
by ordered that the previous order of this court,
on the 21st day of March, 1861, setting aside all
this cause, and placing the same on the calend[ar]
be, and the same is hereby, vacated aside.

district of Cali-

Opinion vacating order for new tr[ial]

District court of U. S., southern district of [California]
4th, 1862.

THE UNITED STATES }
vs.
VICENTE P. GOMEZ. } ing of said court,
n Monday, the first
In this case there was a decision adverse[to] er as counsel can
85 the board of land commissioners, and an a[ppeal] mant in said cause
court. When the case came up for hearin[g]

80 *Order of S. Court revoking mandate.*

Supreme Court of the United States.—December term, 1859.

Appeal from the district court of the United States for the southern District of California.

THE UNITED STATES, app'lt, *vs.* VICENTE P. GOMEZ. } 299 of D. T., 1858.

On consideration of the motion made in this cause on a prior day of the present term, to wit, on Friday, the 27th day of January, A. D. 1860, by Mr. Attorney General Black, to receive the order and decree of this court of the 31st day of January, 1859, docketing and dismissing this appeal, and to revoke and cancel the mandate issued by this court to the district court of the United States for the southern district of California, and of the arguments of counsel thereupon had, as well in support of as against the said motion. It is now here ordered by this court that the aforesaid decree of this court, docketing and dismissing this appeal be, and the same is
81 hereby, rescinded and annulled, and that the mandate issued by this court to the district court of the United States for the southern district of California in this case be, and the same is hereby, revoked and cancelled; and it is further ordered by this court that the clerk of this court do forthwith send a certified copy of this order to the aforesaid district court of the United States for the southern district of California.

Per Mr. JUS. WAYNE.

I, William Thomas Carroll, clerk of the Supreme Court of the United States, do hereby certify that the preceding two pages contain a true copy of the order made by the said Supreme Court in the case of the United States, appellants, *vs.* Vicente Gomez, at December term, A. D. 1859, as the same remains on the records of the said Supreme Court.

In testimony whereof, I hereunto subscribe my name and affix the [SEAL.] seal of said Supreme Court at the city of Washington, this 23d day of October, A. D. 1860.

82 WM. THOMAS CARROLL.
Clerk U. S. Supreme Court.

Filed June 13th, 1862.

JOHN O. WHEELER, *Clerk.*

Minutes of proceedings.—Argument of motion to vacate.—Order for trial de novo.—(Record.)

United States district court, southern district California.—Regular June term, A. D. 1862.—June 13th, 1862.—Hon. Fletcher M. Haight, judge.

VICENTE P. GOMEZ, appellant,
vs.
THE UNITED STATES, appellees. } No. 393.

Now on this day come the parties, by their respective attorneys, the United States represented by the U. S. district attorney, assisted by E. L. Goold, esq., and claimants by Geo. F. Sharp, esq., of counsel, whereupon the hearing of the argument, in support of the
83 motion heretofore made, for vacating the order of this court, made on the 21st March, 1861, setting aside all proceedings herein, and reinstating this cause for trial *de novo* coming on, claimants file "certified copy of order made in the Supreme Court of the the U. S., at its Dec. term, 1859, directing that all proceedings in this court be surceased, etc." Whereupon said motion is argued by counsel and submitted, and leave granted parties to file brief.

Decision of court vacating order for new trial.—(Record.)

United States district court, southern district California.—Regular June term, A. D. 1862.—August 4th, A. D. 1862.—Hon. Fletcher M. Haight, judge.

VICENTE P. GOMEZ, app'l't,
vs.
THE UNITED STATES, app'lee. } D. C., No. 393.—L. C., No. 569.—"Panoche Grande."

84 On this, court delivers its opinion in this case, granting the motion heretofore made by the appellant herein, praying the court to vacate and set aside the order of Hon. Isaac S. K. Ogier, late judge, granting a new trial on this cause. And it is hereby ordered that the previous order of this court, made and entered on the 21st day of March, 1861, setting aside all proceedings had in this cause, and placing the same on the calendar for trial *de novo*, be, and the same is hereby, vacated aside.

Opinion vacating order for new trial.

District court of U. S., southern district of California.—August 4th, 1862.

THE UNITED STATES
vs.
VICENTE P. GOMEZ.

In this case there was a decision adverse to the claimant by
85 the board of land commissioners, and an appeal to the district court. When the case came up for hearing before the district

court, a decree was entered by consent of the then district attorney, confirming the claim. Subsequently, there was an effort to appeal by the district attorney, and both sides seem to have supposed there was an appeal. The case was docketed and dismissed by the Supreme Court of the United States, and a mandate issued to this court. It subsequently appearing that no appeal had been regularly taken, the mandate was recalled, and the case left as it was originally in this court. The decree confirming the claim was duly entered in the district court on 5th day of February, 1858. A term had elapsed before any motion to review or set aside the decree. At the December term, 1860, an order was made by the judge, on his own
86 motion, setting aside the decree, and which was filed the 21st day of March, 1861. With the mode and manner and reason for the exercise of the power assumed by my predecessor, no fault can be found. A more gross case of fraud by those charged with the care of public rights has rarely been presented. The late district attorney, Pacificus Ord, esq., owning about two-thirds of the land claimed, consents to a decree of confirmation, reversing the opinion of the land commissioners, and decreeing a confirmation to the claimant for three leagues of land. The case was one, to say the least, of doubt, and a confirmation of the grant and amount claimed would not probably have taken place if the matter had been contested. It is not, therefore, surprising that my predecessor, on learning the facts, should have been indignant, and set the whole aside. The only question deserving
87 of much consideration is, whether the court had the power, after the lapse of a term, to set aside or vacate a decree duly entered. The decree was made in open court, both parties being represented. Whether the parties were faithfully or honestly represented does not affect the case, so far as the question of jurisdiction is concerned. Involved in the question of jurisdiction is the finality of the decree made and signed the 5th day of February, 1858. This decree was final. There was nothing left to be done but to carry it into execution. It follows that after the lapse of a term the court could not alter, change, or modify it, unless to correct some clerical error. Judicial discretion is, under any circumstances, little better than irresponsible despotism, and when its exercise contravenes established principles it cannot be allowed. In the particular case under consideration, it is to be regretted that the power to do the act
88 complained of did not exist, for the order itself was one which an honest judge might well stretch his judicial power to make. With great reluctance, I decide that the order of this court, made and entered the 21st March, 1861, must be set aside.

The parties, of course, are not without remedy by appeal or otherwise, but no case can confer jurisdiction where it does not exist by law, however desirable its exercise in the particular case.

FLETCHER M. HAIGHT,
District Judge of Southern District of California.

Filed August 4, 1852.

JOHN O. WHEELER, *Clerk.*

89 *Order granting appeal to Supreme Court.—(Record.)*

United States district court southern district of California.—Regular June term, A. D. 1862.—August 25th, A. D. 1862.—Hon. Fletcher M. Haight, judge.

VICENTE P. GOMEZ, app'l'ts,
vs.
THE UNITED STATES, appellee. } No. 393.

On motion of B. C. Whiting, U. S. district attorney, it is ordered that an appeal be allowed the United States to the Supreme Court of the United States from the decision and decree of this court confirming the claim of claimant herein.

Order to withhold trans't, &c.

VICENTE P. GOMEZ,
vs.
THE UNITED STATES. } No. 393.

An order for appeal having been heretofore, to wit, on the
90 25th day of August, 1862, entered in this cause, and the claimant being desirous of moving the court to set aside said order, it is hereby stipulated and agreed that the transcript herein be withheld and all further proceedings stayed until the next term of this court, to be held at Monterey, so as to give the claimant an opportunity to make such motion.

Los Angeles, October 6th, 1862.

B. C. WHITING,
U. S. District Attorney for the Southern District of California.

Filed Oct. 6th, 1862.

JOHN O. WHEELER, *Clerk.*

Notice of motion to vacate appeal.

District court of the United States for the southern district of California.

VICENTE P. GOMEZ
vs.
THE UNITED STATES. } No. 393.

91 You are hereby notified that, at the opening of said court, at the court-room thereof at Los Angeles, on Monday, the first day of December, A. D. 1862, or as soon thereafter as counsel can be heard, a motion will be made on behalf of claimant in said cause

to vacate and set aside the order of said court heretofore entered granting an appeal in said cause, and that such motion will be based on the papers on file in said cause.

McDOUGALL, SHARP & LLOYD,
Attorneys for Claimant.

Dated Nov. 24th, 1862.

Filed this 1st day of December, A. D. 1862.
JOHN O. WHEELER, *Clerk*,
Per F. P. RAMIREZ, *Deputy*.

Affidavit of Wm. McGarrahan in support of motion to vacate appeal.

In the district court of the United States for the southern district of California.

VICENTE P. GOMEZ
vs.
THE UNITED STATES.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

92 William McGarrahan, of lawful age, being duly sworn, deposes and says: That about the month of December, A. D. 1857, for a valuable and fair consideration, he succeeded to the interest of the claimant in the land in controversy in this matter, and is still interested therein; that at the time he so purchased he was informed, advised, and believed that the claim of the said Gomez, presented in this case, was and had been confirmed by a decree of this court on the 5th day of June, A. D. 1857; and affiant purchased under that impression and guarantee, and the deed to him recites the fact of such confirmation; affiant further says that he had no connection with any of the parties interested in this case or their attorneys in any shape, way, manner, or form, nor did he advise nor was he cognizant of any of the proceedings in said case until the said
93 purchase, made as aforesaid; nor was he informed, nor had he heard, that there was any suspicion, question, or doubt as to the regularity, propriety, and fairness of any of the proceedings had or steps taken in said case up to that time.

WILLIAM McGARRAHAN.

Subscribed and sworn to before me this 1st day of December, A. D. 1862.

F. P. RAMIREZ,
U. S. Commissioner South. Dist. of Cal'a.

Filed this 1st day of December, A. D. 1862.
JOHN O. WHEELER, *Clerk*,
Per F. P. RAMIREZ, *Deputy*.

94 *Proceedings in U. S. dist. court on motion to vacate appeal.—(Record.)*

United States district court southern district of California.—Regular December term, 1862.—December 1st, 1862.—Hon. Fletcher M. Haight, judge.

VICENTE P. GOMEZ *vs.* THE UNITED STATES. } No. 393.—"Panoche Grande."

In this case the attorney for the claimant appeared and (the United States attorney being present) moved the court to vacate and set aside the order heretofore made by this court in this case on the twenty-fifth day of August, A. D. 1862, allowing an appeal on behalf of the United States to the Supreme Court of the United States from the decree of confirmation made and entered by this court in this case. The claimant's attorney produced and read and filed the notice of the motion served upon the United States district attorney, also read and filed the affidavit of William McGarrahan after hear-
95 ing the argument of claimant's counsel, the court continued the further hearing of the motion until to-morrow at 10 o'clock a. m.

Proceedings continued.—(Record.)—Not argued and submitted.

United States district court southern district of California.—Regular December term, 1862.—December 2d, 1862.—Hon. Fletcher M. Haight, judge.

VICENTE P. GOMEZ, *vs.* THE UNITED STATES. } D. C., No. 393.

On taking up yesterday's motion in this case this morning the court intimated that there was a stipulation dated October 6th, 1862, and filed on the same day. Whereby it was agreed that this motion should be taken up at the next term of this court to be held at Monterey. Whereupon the United States district attorney and the counsel
96 for claimant stated that the motion to vacate and set aside the order of appeal was taken up yesterday by consent of both parties.

After the hearing of the argument of the United States district attorney in opposition to the motion, the motion was submitted to the court and taken under advisement.

Opinion of the court, vacating appeal.

In the district court for the southern district of California.

THE UNITED STATES *vs.* VICENTE GOMEZ. } Los Angeles, December term, 1862.

1st. Appeal must be brought within five years from the determination of the cause by the court, and judgment entered in the minutes.

2d. It is competent for a court to make an order for the entry of a

decree or judgment *nunc pro tunc*, and when made the decree
97 relates back to the time of the decision, and the time to appeal runs from that time.

In this case a decree of confirmation was ordered the 5th day of June, 1857. The decision was then made and entered in the minutes, and the minutes signed by the judge as usual. On the 21st day of March, 1861, my predecessor, Judge Ogier, made an order vacating the decree entered the fifth day of June, 1857, of his own motion, as the order made in the case states. After the term at which the decree was rendered a notice of motion to vacate the decree seems to have been given, but the order made recites that the court had been imposed upon by reason of the consent of the district attorney, who was a party in interest, and on his own motion vacates the decree.

A motion was made to vacate this order, setting aside the
98 decree mainly on the ground that the court had no jurisdiction to alter, or change, or reverse, or modify its own decree, except to correct some clerical error after the term had elapsed at which the decree was rendered, for the particular reasons which induced the order of my predecessor.—(See 23d Howard's Reports, page 326.)

Upon that motion, which was continued for several terms, and finally heard at the June term, 1862, at Monterey, I held that all jurisdiction over the decree ended with the term at which it was rendered, and no circumstances could confer any jurisdiction on the court to vacate a decree after the term at which it was rendered.

The decree in the case was not drawn up and finally signed and entered until the fifth day of February, 1858. The decree finally signed, after the usual decree of confirmation, has this clause added:

"And it also appearing to this court that heretofore, to wit,
99 on the fifth day of June, 1857, at a regular term of this court, holden at the town of Monterey, State of California, the claim of the appellant in this case had been confirmed by this court, but that it had been omitted by the court to sign the decree of confirmation at the time the decree was made. It is therefore further ordered by this court that the same be signed now as for then."

In other words, the *nunc pro tunc* clause was added to the decree. The order made vacating the order of Judge Ogier was made the fourth day of August, 1862; some short time after this order an ex-parte application was made for leave to appeal from the final decree heretofore made at June term, 1857, and formerly signed and entered the fifth day of February, 1858. An appeal was granted, as a matter of

course, upon application of the district attorney, and without
100 any reference to the particular state of the case, as has been the usual practice in this district. Shortly afterwards a stipulation was filed, signed by the district attorney, that a transcript be withheld, and all proceedings stayed, to give the claimant an opportunity to make a motion to vacate the order granting an appeal.

This motion came on to be heard by consent of the respective parties at the present term at Los Angeles, and involves three ques-

tions, only one of which, however, was debated by the respective counsel.

First. An appeal having been allowed, but the record still remaining in this court, whether the court could vacate the order allowing the appeal from the final decree. No objection being made to the jurisdiction, and the question coming up as on an application for the allowance of an appeal, I held that the motion could be entertained.

Second. There are five years for an appeal; and the next
101 question is, when do the five years begin to run? From the time the judgment is pronounced and decree entered in the minutes, or from the time it is formally drawn up and signed, and entered in the register of decrees?

In the judiciary act of 1789, Statutes at Large, volume 1, page 84, it is enacted: "and writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of," &c.

By the act of 1803, Statutes at Large, volume 2, page 244, it is enacted: "and from all final judgments or decrees rendered, or to be rendered in any circuit court, or in any district court acting as a circuit court in any cases of equity," &c. When the matter or sum in dispute shall exceed the sum of two thousand dollars, "&c.," and such appeals shall be subject to the same rules, regulations,
102 and restrictions as are prescribed by law in cases of writs of error, "&c."

This section adopts the rules, regulations, and restrictions contained in the act of 1789, with respect to the time within which a writ of error may be brought, "&c."—(See Brightley's Digest, page 261, and cases there cited.)

In the case of United States *vs.* Pacheco, 20 Howard's Rep., 261, it was held that as the act of Congress passed on the 3d March, 1851, does not specify the time within which an appeal must be made to the Supreme Court from the district courts of California, the subject must be regulated by the general law respecting writs of error and appeal. An appeal, therefore, must be taken within five years from the final decree. The first inquiry, therefore, is when does the time begin to run? From the time the decision is pronounced and entered in the minutes, or not until the decree is formally drawn
103 up, and signed, and entered? My first impressions were that until the decree was actually entered the time for appealing did not begin to run, but upon examination I find the highest authorities hold differently.

It will be remembered that the acts of 1789 and 1803 place writs of error and appeals on the same ground.

In the case of Fleet *vs.* Young, 2 Wendell, Rep. 522, the court of errors in New York held that the time for suing out the writ of error commences from the time of the entry of the rule for judgment, and not from the time of filing the record.

The statute of New York is similar to the law of Congress. The chancellor said, in the case cited: "The language of the statute,

as contained in the recent revision, is that the writ of error shall be brought within two years after the rendering
104 of the judgment or final determination of the court, and not after," &c. It will be perceived that the law of Congress of 1789 and the statute of New York are substantially the same. Both the law of Congress and the statute of New York differ from the English statutes as they were when this decision was made. By the English statute a writ of error could be brought within twenty years after the judgment record signed and filed, and judgment entered; by rule of the House of Lords an appeal must be brought within five years after the enrolment of the decree. In the case of Fleet *vs.* Young, supra, the chancellor discusses the difference between the New York statute and the English statute, and also says: "In point of principle it is not very material whether one construction or the other is adopted, *as the plaintiff in error may himself obtain permission to make up the record, if the adverse party neglects to do it*
105 *within a reasonable time after the actual rendition of the judgment*, (Jackson *vs.* Parker, 2d Caine's R., 385,) and it is not necessary to wait for the filing of the record before a writ of error can be sued out. It is sufficient if the judgment be signed and filed at any time before the actual return of the writ of error, although after the return day is past."—(Arnold *vs.* Sanford, 14 John. R., 417.)

The case of Lee *vs.* Tillottson, before the former supreme court of New York, (4th Hill, page 27,) is also an authority in point. This was a motion by the defendant for leave to draw up a statement of facts from the special report made by referees, and to have such statement settled and inserted in the judgment record, to the end that the defendant might bring a writ of error. It was objected that more than two years had elapsed since the decision of the motion to set aside the report, but not since judgment was perfected by
106 filing the record, &c. The opinion of the court was delivered by Bronson, J. He said: "Although it does not appear upon the papers that a rule for judgment was entered at the next term after the report was made, there can be no doubt that it was done, and, besides, if the rule was never entered, *it would be almost a matter of course to allow it to be done nunc pro tunc.* But I think the question of limitation does not turn on the time of entering the rule for judgment, but on the time when the final determination was made on the motion to set aside the report. The rule for judgment was undoubtedly entered in May term, 1837, and, if we date from that, the time for bringing a writ of error had expired before the motion for a rehearing was made, which was in May, 1840. The question, then, is whether the limitation dates from the final determina-
107 tion of the court, which was in July, 1840, or from the subsequent filing of the judgment record in January, 1841. The statute provides that 'all writs of error upon any judgment or final determination rendered in any cause, shall be brought within two years after the rendering of such judgment on final determination, and not after.' The judgment on final determination in this cause was rendered in July term, 1840, when the motion which had been made

to set aside the report of the referees was denied. The record which was afterwards filed was not the judgment, but only a written memorial of the judgment which had been previously rendered. The court of errors arrived at the same conclusion, on this question, in Fleet *vs.* Young. It follows that the time for bringing a writ of error has already expired, and we ought not to put the plaintiff to the
108 expense and ourselves to the inconvenience of settling a case when we see it can do no good."

I have made this long extract from the opinion of Judge Bronson, because, so far as this point is concerned, it is stated with his usual clearness and ability, and renders it unnecessary to add anything more on the point.

Third. The last point, and which was the one principally discussed on the argument, is the effect of the *nunc pro tunc* clause added to the decree, signed, filed, and entered the 5th February, 1858. In the case of Lee *vs.* Tillottson, supra, it is said such an order would have been a matter of course. The effect of it, of course, if it has any effect, is to make the judgment relate back to the time when the decree should have been filed and entered. It is unnecessary to discuss the power and jurisdiction of the court to make an order
109 *nunc pro tunc*, or the effect of such an order. All who are in any degree familiar with the practice of courts, are aware that it is a matter of frequent occurrence. The propriety of the order in the particular case is not, of course, to be considered; if there was power to make it, it must stand until in some way duly vacated.

The counsel for claimant referred to many authorities which it is deemed unnecessary to notice, with, perhaps, one exception. In the case of John Smythe and others, appellants, *vs.* Richard Thomas Clay, respondent. (1st Brown's Parliamentary Cases, 453, Case No. 5 of appeals,) the decree was actually enrolled within five years from the time of bringing the appeal, but more than twenty years after the decree was actually rendered. It is unnecessary to examine this language, but it seems to have been held that the enrolment
110 of any decree pronounced by the court of chancery is deemed as being, by legal relation, the act of the same day on which the decree was pronounced.

I have come to the conclusion that the time has passed for any appeal in this case, and shall order accordingly.

FLETCHER M. HAIGHT,
District Judge of U. S. for Southern Dist. of Cal'a.

Order of court vacating appeal.—(Record.)

United States district court, southern district of California.—Regular December term, 1862.—December 4th, A. D. 1862.—Hon. Fletcher M. Haight, judge.

VICENTE P. GOMEZ *vs.* THE UNITED STATES. } No. 393.

In this court delivered an opinion on the motion submitted
111 the day before yesterday, and ordered that the appeal taken

on the twenty-fifth day of August, A. D. 1862, by the United States to the Supreme Court of the United States, from the final decree of confirmation herein, be vacated and set aside; and it is further ordered that the order of this court made on the said twenty-fifth day of August, A. D. 1862, allowing said appeal, be, and the same is, vacated and set aside, and the motion of the United States district attorney for leave to take an appeal on behalf of the United States to the Supreme Court of the U. S., from the said final decree, be, and the same is, denied.

112 *Petition for injunction against clerk and attorney.*

Circuit court of the United States in and for the southern district of California.

WM. MCGARRAHAN, complainant,
vs.
BILLINGTON C. WHITING & JOHN O. WHEELER, defendants.

STATE OF CALIFORNIA
County of Monterey, ss:

To the honorable the judge of the circuit court of the United States for the southern district of California.

Your orator, William McGarrahan, of San Francisco, complaineth and respectfully showeth that he is a native and citizen of Ireland, Kingdom of Great Britain and Ireland.

That he is at present residing at San Francisco, that Billington C. Whiting, esq., and John O. Wheeler, esq., are both citizens of the United States of America, and both residents of said southern
113 district of California; and your orator further showeth that, in pursuance of an act of Congress entitled "An act to ascertain and settle private land claims in the State of California," passed March 3, 1851, one Vicente P. Gomez presented to the board of land commissioners organized under said act, on the 7th day of February, 1853, for confirmation his claim to a tract of land of four leagues, called Panoche Grande, situate in the said southern district, and in the now counties of Monterey and Fresno.

That thereupon such proceedings were had so that on the 6th day of March, 1853, a decree rejecting said claim was made and entered by said commission.

That an appeal was duly perfected therefrom to the district court of the United States for said southern district. That such proceedings were had upon said appeal, that a decree of confirmation of said tract of land to the extent of 4 leagues was duly entered in
114 said district court June 5, 1857, and is now on file and of record in the office of the clerk of this court, to which complainant prays leave to refer as though fully set out herein.

That no appeal within the time prescribed by law was perfected from said decree to the Supreme Court of the United States.

That on the 22d day of December, 1857, said Gomez sold and conveyed said premises and lands to complainant by deed dated on that day, and recorded in Fresno county recorder's office, December 31, 1857, and also recorded in Monterey county recorder's office on the ——— ———. That the consideration of such conveyance was the sum of eleven hundred dollars lawful money of the United States, then paid at and about the date of said deed by complainant to said Gomez.

That in pursuance of an act of Congress entitled ——— ———, complainant applied to the United States surveyor general of
115 the State of California to have said lands surveyed, in pursuance of the terms and provisions of said decree.

That said surveyor general caused the same to be surveyed and a plat thereof to be filed in his office.

That said surveyor general approved said survey and plat on the ——— ———, A. D. 1862, and after so approving the same, and on or about the —— ——, A. D. 1862, forwarded a certified copy of said decree of confirmation and said plat, and the filed notes of said survey to the department at Washington, for the purpose of having a patent issued for the land so confirmed.

That the Commissioner of the General Land Office of the United States at Washington interposed objections to the issuance of a patent thereof, and declined to issue such patent. That from his decision so declining an appeal was duly taken by complainant in the name of said Gomez to the Secretary of the Interior of the
116 United States, viz: the Hon. Caleb Smith. That the merits of such appeal and the questions involved therein were fully heard and investigated by said Secretary of the Interior.

That thereupon, and on the 29th day of December, 1862, said Secretary decided as follows:

"My conclusion is that the decree of the district court for the southern district of California confirming the grant has become final. The United States has no longer interest in the controversy. No claim of third parties has been interposed. The suggestions of fraud in the grant, or in the manner of procuring its confirmation, are *res judicata*, and I am unable to discover any reason why a patent should not be issued in conformity with the decree of the court and the survey. You (the Commissioner of the Land Office,) will therefore issue a patent for the land in accordance."

That notwithstanding said decision a patent for said lands,
117 so as aforesaid confirmed and surveyed, has not been issued, or if issued, has not been received by said surveyor general, or the complainant.

That defendant Wheeler is clerk of the United States district court for the southern district of California; that defendant Whiting is United States district attorney for said southern district.

That, notwithstanding said decree of confirmation has become final, and complainant is entitled to have said lands patented, some person unknown to complainant in Washington, D. C., using the name of the Attorney General of the United States, but as complainant is advised

and charges without the authority of said Attorney General, has by telegraph instructed said Whiting and said Wheeler, or one of them, to make out and certify and return to the Supreme Court of the United States a transcript on appeal from said final decree of con-
118 firmation, to wit, the decree in case No. ——, U. S. district court for the southern district of California, entitled Vicente P. Gomez *vs.* The United States. That said Whiting, being ignorant of his duty in that behalf, and combining and confederating together with divers persons unknown to complainant, and whose names, when discovered, complainant prays he may be at liberty to insert herein, with apt words to charge them as parties defendant hereto, contriving how to wrong and injure complainant, and claiming to proceed under an act of Congress entitled "An act relative to appeals to the Supreme Court of the United States," approved August 6th, 1861, threaten to make, certify, and forward to said Supreme Court a transcript on appeal in said case.

That if permitted and allowed so to do complainant will be subjected to harassing delays, annoyance, groundless and vexatious litigation, and great expenditures of money in the employment of
119 counsel to procure a dismissal of such pretended appeal, and to procure a discontinuance of such proceedings as may be taken on said proposed transcript in the Supreme Court of the United States.

That said Whiting and Wheeler are each irresponsible; that they may be protected in such threatened proceedings on the ground that they are public officers, and will only act in good faith, and, as they believe, in the discharge of their respective duty.

All which actings, doings, and pretences of the said defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of complainant in the premises. In consideration whereof, and forasmuch as your orator is entirely remediless in the premises, according to the strict rules of the common law, and can only have relief in a court of equity where mat-
120 ters of this nature are properly cognizable and relievable, to the end thereof that the said B. C. Whiting and the said John O. Wheeler, and the rest of their confederates, when discovered, may, if they can show why complainant should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, full, true, and direct answer make to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated, and they and each of them thereunto distinctly interrogated.

May it please your honor to grant to complainant the most gracious writ of *subpœna* of the United States of America, to be directed to the said Billington C. Whiting and John O. Wheeler, and the rest of their confederates, when discovered, thereby commanding them and every of them, at a certain day and under a certain pain therein, to be specified personally, to be and appear before your honor in
121 this hon'l court, and then and there to answer all and singular

the premises, and to stand to perform and abide such order and decree therein as to your honor shall seem meet, and your orator will ever pray.

May it please your honor to grant to complainant a writ or writs of injunction restraining the said defendants Whiting and Wheeler, and their confederates when discovered, and also their servants and employés, during the pendency of this action, from making out, certifying, or forwarding to Washington, D. C., in their or either of their official capacity, or under their official signature, a transcript on appeal from the decree, so as aforesaid rendered in the district court of the United States for the southern district of California in case No. —, entitled Vicente P. Gomez *vs.* The United States. And complainant also prays for a perpetual injunction restraining and enjoining

122 defendants, and such of them, their confederates when discovered, and also their servants and employees, from making out, certifying, or forwarding to Washington, D. C., in their or either of their official capacity, or under their official signature, a transcript on appeal from the decree, so as aforesaid rendered in the district court of the United States for the southern district of California in case No. 393, entitled, Vicente P. Gomez *vs.* The United States.

And complainant also prays for such other and further relief as may be agreeable to equity.

SOL. A. SHARP,
Solicitor for Complainant.
STONE & PATTERSON,
Of Counsel.

123 UNITED STATES OF AMERICA,
State of California, ss:

William McGarrahan, being sworn, says he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters he believes it to be true.

WM. McGARRAHAN.

Subscribed and sworn to before me on this 6th day of April, 1863
P. B. CORRUNALL,
Notary Public in and for the City and County of San Francisco, State of California.

Opinion on the petition for injunction.

124 In the district court of the United States for the southern district of California.

WM. McGARRAHAN
vs.
B. C. WHITING & JOHN O. WHEELER.

This is an application for injunction to restrain the clerk and district attorney from making out a transcript of the record in the case of

the United States *vs.* Vicente P. Gomez, such transcript as alleged being in reference to an appeal. I have heretofore expressed to the clerk, John O. Wheeler, verbally, that, in my judgment, any person willing to pay for the same is entitled to a copy of any record in his office, but procuring copies of record on behalf of the United States, where no appeal is pending, is a fraud upon the government, and not to be tolerated. In this case, as in most of the litigations
125 which have come under my observation, private parties are seeking their own ends, and conducting litigations at the expense of the United States, wherein the final result is matter of entire indifference, so far as the interest of the government is concerned.

In the case Gomez *vs.* The United States no appeal is pending, nor can any be taken from the final decree by reason of lapse of time.

The district attorney, under the act of 1861, has no power or authority to certify a transcript except where there is or may be an appeal. In this case his certificate would be a mere nullity.

In regard to the clerk, he is the custodian of the records, and I am not aware that he has refused a copy of any record to any person desiring the same and paying the expenses thereof; but whereas in the case referred to I happen *to know* that the government has no interest, I shall not certify any account for copies at the expense of
126 the United States.

It does not, however, seem to me that the case is one proper for an injunction. No such injury can result as will justify the extraordinary remedy by injunction. In either case, that no improper use be made of any transcript, the certificate should state that no appeal is pending.

F. M. HAIGHT.

127 UNITED STATES OF AMERICA,
Southern District of California:

I, Billington C. Whiting, United States attorney for the southern district of California, do hereby certify that the foregoing one hundred and seven pages are a full, true, and correct copy of all the proceedings, entries, and files in the district court of the United States for the southern district of California, except the transcript sent up from the late board of land commissioners in the case of the United States *versus* Vicente P. Gomez, number 393 on the docket of the said court, for the claim called "Panoche Grande."

In witness whereof, I have hereunto set my hand this first day of December, 1863.

BILLINGTON C. WHITING,
U. S. District Attorney for the Southern Dist. of California.

8 In the Supreme Court of the United States.

UNITED STATES
vs.
VICENTE P. GOMEZ, claiming "Panoche Grande."

Edmond L. Goold, being duly sworn, deposes and says, that he is a member of the bar of California and of the Supreme Court of the United States.

That, in the city of San Francisco, he was retained by the honorable Edwin M. Stanton, in the year 1858, as special counsel for the United States in the case of Vicente P. Gomez *versus* The United States, then pending in the district court of the United States for the southern district of California, and that deponent has ever since been and now is the special counsel for the United States in the case aforesaid.

That shortly after the judge of the said court had allowed an appeal in the said case from the confirmation and orders in favor of the claimant, Gomez, deponent, applied to the clerk of said
129 court for a transcript of the record in the said case, and was answered by the said clerk, Mr. J. O. Wheeler, that he would prepare and deliver to deponent such transcript.

That this application was made on or about October 10th, 1862, and in the presence and with the concurrence of B. C. Whiting, esq., the district attorney of the United States for the southern district of California.

That said transcript not being forthcoming, deponent, on or about December 2, 1862, again demanded of said clerk a transcript of the record in said case, when said clerk replied that he had changed his mind upon the subject, and would not prepare or deliver a transcript in said cause. Deponent offered to pay said clerk his customary fees for a transcript of said record, but said clerk persisted in his refusal to prepare one.

On or about August 10th, 1863, deponent again demanded of said clerk a transcript of said record, and at the same time exhibited to him the original letter of the Attorney General of the United
130 States, a copy of which letter is hereto appended; and, at the same time, handed to said clerk a written demand, a copy of which is appended hereto; and the said clerk refused to furnish deponent a transcript of said record, stating that he had forwarded to the Attorney General of the United States a copy of each paper in the case, but that he would not furnish a certified copy of the record, as he was satisfied the Attorney General of the United States intended to use such certified copy as a transcript on appeal in the Supreme Court of the United States. And further deponent saith not.

EDMOND L. GOOLD.

Subscribed and sworn to this 28th day of August, A. D. 1863, before me.

ALFRED BARSTOW,
Notary Public.

In the district court of the United States in and for the southern district of California.

VICENTE P. GOMEZ, claiming "Panoche Grande." }
UNITED STATES. }

J. O. WHEELER, Esq.,
Clerk of the said Court.

SIR: Pursuant to my instructions contained in the original of the subjoined copy of a letter from the Hon. Edward Bates, Attorney General of United States, I now demand of you a certified transcript of the papers, documents, and proceedings in this cause, and hereby tender to you, in the name and on behalf of the United States, your fees as clerk, for such transcript.

EDMOND L. GOOLD,
Special Counsel for the United States.

Monterey, Aug. 10th, 1863.

132 ATTORNEY GENERAL'S OFFICE,
Washington, 9 *June*, 1863.

SIR: As special counsel of the United States in the case of Vicente P. Gomez *vs.* The United States, a claim for a tract of land called Panoche Grande, pending in the United States district court for the southern district of California, I desire you to obtain for the use of the United States, a properly certified transcript of the record of that case, showing all the proceedings of the district court, for the use of this office, and for the purpose of an appeal to the Supreme Court of the United States, if I shall deem it proper to prosecute such appeal.

You will call upon the United States district attorney and act in concert with him in the case; but I desire you will attend personally to the matter of procuring a certified copy of the record, and having it transmitted to this office.

And you will of course call upon the district attorney for any professional aid he can render you as special counsel of the United States.

I have written to Judge Haight upon the subject of obtain-
133 ing a transcript of the record in the case; and I have no doubt he will do what is proper to cause it to be made and delivered to you. I have also caused money to be sent to the marshal, who will be instructed to pay the clerk the cost of the transcript on your order or Mr. Whiting's.

You will please advise me of your proceedings.

Very respectfully, your obedient servant,

EDW'D BATES,
Attorney General.

E. L. GOOLD, Esq.

Judge p 17.

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SUPREME COURT OF THE UNITED STATES.

V. P. GOMEZ, appellee,
THE UNITED STATES, appellant.

POINTS FOR APPELLANT.

1. The claim of the appellee for a confirmation of his pretended grant of four leagues of land, is invalid and should be rejected.

2. The pretence that the governor of the province of Upper California issued to him a grant for the land claimed, is simply false. No such grant ever issued.

3. The parol testimony touching the loss of the pretended grant is destitute of force, and is incompetent to establish the existence or loss of said pretended grant.

4. The claimant did no act whatever, in pursuance of the purpose of the colonization laws of Mexico. He did not improve the land; he never went on the land; he never saw the land. (United States *vs.* Castro, 24 How., 350.)

5. There is no archive evidence of his pretended grant. It is recorded in no book; it is mentioned in no index.

6. The forgery, mal-practice, and the attempts to stifle investigation, which mark the history of the case, amount to full proof of the conviction of the claimant that the claim is spurious.

EDMUND L. GOOLD,
Special Counsel of United States.

Supreme Court of the United States.

No. 139.—December Term, 1865.

VINCENTE P. GOMEZ, Respondent,

ADSM.

THE UNITED STATES.

RESPONDENT'S BRIEF.

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RESPONDENT'S BRIEF.

This is an appeal from a decree of the District Court of the United States for the Southern District of California, confirming the title of the respondent to the land described in the petition.

This decree was *pronounced* by the court, and minuted down in open court, at the June term thereof, viz., on the 5th of June, A. D. 1857.

Afterwards, at the December term of said court, viz., on the 5th of February, A. D. 1858, a decree was formally signed, and ordered by the court to be entered nunc pro tunc, as of the 5th of June, A. D. 1857, the day of its pronouncement.

At the regular December term of the court for 1857—March 15th, 1858—the acting United States district attorney moved for leave to take an appeal in this case, with others; but subsequently, viz., December 7th, 1858, at the regular December term of the court for 1858, the motion was withdrawn. No appeal was afterwards taken to this decree till August 25th, 1862, when, at the June term of the court, the court ordered, on motion of B. C. Whitney, United States district attorney, that an appeal

be allowed to the Supreme Court of the United States, from the decision and decree of this court, confirming the claim of claimants herein. This term of the court was held at Monterey. At a subsequent special term of the court, held at Los Angeles, in October, 1862, it appears that Mr. Whitney, the U. S. district attorney, filed a paper with the clerk, in which he refers to the order for an appeal, of August 25th, 1862, and states that, as the claimant was desirous of moving the court to set aside this order, it had been stipulated and agreed that the transcript should be withheld, and all further proceedings stayed until the next term of this court, to be held at Monterey, so as to give the claimant an opportunity to make such motion.

The respondent's counsel, November 24th, 1862, gave notice to the United States district attorney that, at the next December term of the court, he should move to set aside the order of the court, of August 25, granting an appeal. This motion was heard on the 1st and 2d of December, by consent of the parties, and on the 4th of the same month it was ordered by the court that the order of August 25th, allowing the appeal, should be vacated, and that the motion of the United States district attorney, for leave to take an appeal from said decree, was denied.

No citation was ever signed by the judge, or issued, or served upon the respondent.

No transcript was sent up and filed in this court, until February 29th, 1864.

Upon this statement of facts, the jurisdiction of this court to entertain this pretended appeal, is denied; and, in support of this denial, the following propositions are submitted:

THIS COURT HAS NO JURISDICTION:

First. Because the appeal was not taken within five years from the date of the decree.

Second. Because there was no citation.

Third. Because the appeal was not entered at the term of this court next succeeding the appeal.

Fourth. Because the pretended appeal, by virtue of which this entry was made, lost all its legal effect, by reason of the subsequent proceedings in the district court on the part of the United States district attorney.

Fifth. Because the decree appealed from was not a final decree.

We propose to discuss these propositions in the order prescribed.

It may be objected, however, that the first three questions have already been considered and decided by this court, in the case of Gomez, 1 Wallace, 690, and are no longer open for argument.

But we respectfully submit, that the only matter absolutely decided by the court in that case was, that, upon the imperfect record before them, they were not prepared to pass finally upon the rights of the parties. And, accordingly, the court reserved its decision upon the question raised at the argument until a full and perfect record could be brought up upon certiorari. The most, therefore, that the court could then say, and did say, was, that when a complete record should be brought before them, they would render a decision, and until then, they would, *for the purposes of that case only*, overrule the motion to dismiss.

I.

This court has no jurisdiction, because the appeal was not taken within five years from the date of the decree.

It is settled, by the Pacheco case, 20 How. U. S., 261, that appeals from the district court, in California land cases, must "be governed by the judiciary acts of 1789 and 1803, which regulate writs of error and appeal to this court from inferior tribunals, and by these acts, the party may take his appeal at any time within five years after the passing of the decree by the inferior court."

The record shows that at the regular June term, 1857, viz, June 5th, "the court being fully advised in the premises, delivered its opinion confirming the claim of the appellant to the extent called for in the transcript and papers—three leagues or sitios de granado major—and a decree was ordered to be entered up in conformity to said opinion." Afterwards, at the December term of said court, viz, on the 5th of February, A. D. 1858, a decree was formally signed and ordered by the court to be entered nunc pro tune, as of the 5th of June, A. D. 1857, the day of its pronouncement.

It is submitted that the decree, took effect and became absolute on the 5th day of June, 1857, when it was pronounced and entered on the minutes.

When did the five years' appeal commence to run?

In the San Pedro case, 2 Wheat., 142, the court say, after referring to the rules and regulations applicable to writs of error, "All these are, in the opinion of a majority of the court, applicable to appeals under the act of 1803. * * * * * It follows that an appeal in admiralty, equity, and prize causes may be taken at any time within five years from the final decree, or sentence being *pronounced*, subject to the saving contained in the 22d sec. of the act of 1789, which is one of the points that was discussed at the bar.

In Yeaton et al. vs. Lennox et al., 7 Peters, 221, the court held the act of March, 1803, which gives the appeal from decrees in chancery, subjects it to the rules and regulations which govern writs of error. Under this act it has been always held that an appeal may be prayed in court *when the decree is pronounced;* but if the appeal be prayed after the court has risen, the party must proceed in the same manner as had been previously directed in writs of error.

In Whiting et al. vs. The Bank of the United States, 13 Pet., 15, the court hold:

"But is the objection itself, in principle, well founded? That depends upon this: whether the decree of foreclosure and sale is to be considered as the final decree in the sense of a court of equity, and the proceedings on that decree a mere mode of enforcing the rights of the creditor and for the benefit of the debtor; or whether the decree is to be deemed final only after the return and final confirmation of the sale by a decretal order of the court. We are of opinion that the former is the true view of the matter. The original decree of foreclosure and sale was final upon the merits of the controversy. The defendants had a right to appeal from that decree, as final upon those merits, *as soon as it was pronounced*, in order to prevent an irreparable mischief to themselves. For, if the sale had been completed under the decree, the title of the purchaser under the decree would not have been overthrown or invalidated even by a reversal of the decree; and, consequently, the title of the defendants to the lands would have been extinguished, and their redress upon the reversal would have been of a different sort from that of a restitution of the land sold."

In Silsby et al. vs. Foote, 20 How. U. S., 294, the court say:

"This is a motion to dismiss an appeal, docketed as No. 106, on the ground that a previous appeal, docketed No. 54, had been taken by the same parties, and from the same portions of the decree below. The final decision had been made by the court, between the parties, on the coming in of the master's report on the 28th August, 1856, and an appeal duly taken on the 4th September following. The decree was special in its terms, and was not settled or signed by the judge until the 11th December, 1856, on which day the second appeal was taken. * * * * * * * In the case of a simple judgment or decree, such as an affirmance or reversal, and the like, there would seem to be no difficulty in taking the appeal at any time within the ten days after the decision of the case was

pronounced. * * * * * As, upon our view of the case, presented on the motion, the first appeal was regular, the one taken and standing on the docket No. 106, should be dismissed."

In Bank of U. S. vs. Daniel, 12 Pet., 51, 52, the court decide, that, if the sum claimed, with interest thereon to the date of the *pronouncement of the decree*, amount to $2,000, then the Supreme Court would have jurisdiction of the case on appeal, but *aliter*, if to make this amount, interest had to be computed beyond the day of *pronouncement.*

Appeal may be taken before enrollment.

Forgay vs. Conrad, 6 How. U. S., 201, 203.
Farmers' Loan and Trust Co. vs. Carrol, 2 Comst., 568.
Michaud vs. Girod, 4 How. U. S., 503.

See also, Skip vs. Harwood, temp. Lord Hardwicke, (3 Atkins 565, marginal,) where the court held that the decree took effect from the *pronouncement*, and if a party attends a cause, and after hearing the *decree pronounced*, and does any act in contravention to it, he is guilty of contempt, and liable to be committed to the Fleet.

1 Gill & Johnson, 398, 399.
Bank of Geneva vs. Hotchkiss, 5 How. Prac., 478.
Wells vs. Danforth, 7 How. Prac., 197.

In Bates vs. Delavan, the court hold: "The direction to prepare a decree of foreclosure, in conformity with the decision of the court, I presume means nothing more than that the decree shall be drawn up in the proper form to be signed by the Judges and enrolled, but a formal decree in equity is not absolutely necessary to its validity as a matter of evidence."

Winans vs. Dunham, 5 Wend., 47.
Execution may issue without enrollment:
Newland Chy., 194.
Goelet vs. Lansing, 6 John. Chy., 76.

Fleet vs. Young, 12 Wend., 523.
Lee vs. Tilloston, 4 Hill., 28.
Gay vs. Gay, 10 Paige Chy. R., 375.
Bay vs. Van Ransalier, 1 Paige, 428.

If the appeal could be taken on the day the decree was rendered or pronounced, the time to appeal then commenced, and terminated in five years thereafter.

The decree is the act of, and is created by the court.

The *signing* is a mere formal method of preserving the evidence of the decree.

Unless specially required by statute or some rule in chancery, the decree is as effective without as with the signing.

We have been unable to find, and believe there is no law or rule applicable to the federal courts, that required the decree in question to be *signed;* and even if such exists it would be simply directory, and not mandatory; and under such circumstances the decree would be vital and valid *without* the *signing.* As decided by the Supreme Court of the United States, in Secombe vs. Steele, 20 How. U. S., 102, where the court say: "The decree purports to have been made by the court; it is formal, and disposes of the cause, and is only defective in not having the signature of the judge. But it comes from the legal custody, has been accepted by the parties, and acted on by them; and was certified to the Supreme Court of the territory as a paper in the cause. We do not regard the signature of the judge as indispensable to its authenticity. The statute that directs the signature must be considered as directory, and other evidence to establish its verity as a record of the court may be considered."

THE NUNC PRO TUNC CLAUSE OF THE DECREE.

On the 5th day of February, 1858, the decree of June 5th, 1857, was amended, signed, and ordered filed nunc pro tunc.

We quote transcript, page 66: "And it also appearing to the court that heretofore, to wit, on the 5th day of June, A. D. 1857, * * * * * * the claim of the appellant had been confirmed by the court, but that it had been *omitted by the court to sign the decree of confirmation at the time it was made. It is further ordered by this court that the same be signed now as for then.*" * * * It was also filed of that date as of the 5th of June, 1857. This order made the decree *signed* as of the 5th day of June, A. D. 1857. It was simply to preserve a more formal record of the decree. To have this *omission of the court supplied* was the *right* of the claimant. It was within the power, and clearly the duty of the court to supply the omission, and preserve, in an authentic form, the evidence of its own decree—and no cause could be shown against such an order—it was a matter of course.

Lawrence vs. Richmond, 1 Jac. and W., 241.
Donne vs. Lewis, 11 Ves., 601.
Jesson vs. Brewer, 1 Dick., 371.
2 Dan. Ch. Pr., 1219, 1220, (marg.)
Swain vs. Naglee, 19 Cal., 127, and authorities hereinbefore cited.

The nunc pro tunc clause merely carried back the formal act of signing, against which no objection could have been urged, because it was a mere matter of form.

In our view the time to appeal commences from the time of the *pronouncement of the decree.* The *pronouncement* is the creation of the decree, and is not a formal act; no decree can be *pronounced nunc pro tunc.* It may be *passed nunc pro tunc*, it may be *signed nunc pro tunc*, as in this case. It may be *entered nunc pro tunc* at any time when, by the omission of the court or act of Providence, it was not entered at the time it should have been. It may even be *dated and entered nunc pro tunc*, as of date anterior to the *pronouncement*, to avoid abatement by death of a

party, after argument and before decree, as in cases of
Block vs. Shaw, 20 Cal., 68.
Savings and Loan Society vs. Gibb, 21 Cal., 609.
Campbell vs. Mosier, 4 I. Ch. R., 342.
Slicer vs. Bank of Pittsburg, 16 How., 579.
Gray vs. Brignardello, 1 Wallace, 627.

II.

This court has no jurisdiction because there was no citation.

To render the alleged appeal effective or to remove the cause on appeal, so as to give the Supreme Court of the United States jurisdiction, a *citation* should have been *issued*, signed by the judge, *served* on the claimant, and returned with proof of service. This was necessary under the acts of 1803 and 1789, because the appeal was not taken at the June term, 1857, when the decree was *pronounced*, nor at the December term, 1857, (5th February, 1858,) when, according to the view of the opposing counsel, the decree was *signed* and *enrolled*.

The whole record fails to disclose that there was any citation *issued*, or served.

In the United States vs. Hodge, 3 Howard, 534, the court say: "This case is brought here by a writ of error to the circuit court for the eastern district of Louisiana, and a motion has been made to dismiss it, because the *citation* was signed by the clerk, and not by a judge of the circuit court, or a justice of the supreme court, as directed by the act of Congress of 1789, ch. 20, sec. 22.

"*The defendant is not bound to appear here, unless the citation is signed in the manner prescribed by law;* and as that has not been done in this case, the writ must be dismissed."

In Villabolos et al. vs. The United States, 6 How., 90, the court say—Mr. Chief Justice Taney delivering the opinion: "Thus, in order to determine how appeals must

be prosecuted from the superior court of Florida, under the act of 1828, we are in the first place referred to the law in relation to the district court in the state of Missouri, and that law refers us again to the act in relation to the district court of Kentucky, and that law, in express terms, refers us to the laws regulating appeals from a circuit court of the United States—that is to say, to the acts of 1789 and 1803. Appeals from the superior court of the territory of Florida, therefore, are governed by these acts; and consequently the case of the United States vs. Hodge, 3 Howard, 534, is decisive against the present appeal. When the appeal is not made in open court, and at the term at which the final decree is passed, the *citation* is necessary, (The San Pedro, 2 Wheat., 142,) and where necessary, the law requires it to be signed by the judge; *and we have no power to receive an appeal in any other mode than that provided by law.*"

"Lloyd vs. Alexander, 1 Cranch, 365; Bailiff vs. Tipping, 2 Cranch, 406; Wood vs. Lide, 4 Cranch, 180; Picket's Heirs vs. Legerwood, 7 Peters, 144; and Yeaton vs. Lenox and others, 8 Peters, 123. It follows, that where a *citation* is required in a case of appeal, it must, as in the writ of error, be *issued* and *served on the opposite party before the term of the appellate court next after the appeal is entered.* Yeaton vs. Lenox, 7 Peters, 220.

"There was no such *citation* in the present case, and the entry in the clerk's office, standing by itself, was not a removal of the case by appeal, according to the act of Congress. There was, therefore, no appeal within the time limited by law."

In Bacon et al. vs. Hart, 1 Black, 38, the court, by Mr. Chief Justice Taney, say: "In March, 1858, judgment was rendered by the court for the plaintiff. In October of the same year a writ of error was sued out, returnable on the first Monday in December next thereafter, and service of the citation was, on the 9th of October, admitted by William Hart, senior. But this writ of error

was not returned during the term to which it was made returnable, and failed, therefore, to bring up the case. The *citation not being served* on the party or his counsel, *the cause is not brought into this court*, agreeably to the act of 1789, and the writ must therefore be dismissed *for want of jurisdiction*."

We do not understand that the United States Supreme Court, in the case of *Gomez*, 1 Wallace, 690, place their decision as to the citation on the ground that the original decree might be considered as having been rendered on the 4th August, 1862, instead of February 5th, 1858. They suggest that it *might* be placed upon that ground. But a reference to the previous decisions of the same court in this very case, shows that they did not so intend. In the case of *Gomez*, reported in 23d Howard, the court held that no appeal had been taken; and in 1 Wallace they held that "the final decree in the case was that of the 5th of February following," viz., 1858. How, then, can an appeal taken on the 25th of August, 1862, be regarded as taken at the same term in which the decree was entered? The judge who delivered the opinion of the court, seeing this difficulty, refers to the order of the 4th August, 1862, vacating the order of March 21st, 1861, and says: "admitting that the order restoring the original decree was one of any validity, then, indeed, no citation was necessary, because the appeal was taken in open court." Appeal from what? Not from the order of 4th August, for no appeal lay from that order; but from the *final* decree, and that decree the court has already said was entered on the 5th February, 1858.

Under these circumstances, the court well said: "But it is unnecessary to place the decision entirely upon that ground," and we do not understand that it rests upon that foundation, but upon the ground next stated by the court, viz., "that the claimant having *at once* signified his intention to move the court to set aside the order granting the appeal—that thereupon it having been stipulated and

agreed between the parties that all further proceedings should be stayed until the next term of the court; that notice in writing was given by claimant to vacate the order granting the appeal; and that a petition for an injunction was afterwards filed to prevent the appeal—all show that the object of the citation, viz., notice, was fully answered."

The court, owing to the imperfect record before them, fell into several errors of fact, upon which this branch of the opinion was based.

The record now before the court shows that the claimant did *not* "*at once*" signify his intention to move the court to set aside the order granting the appeal, and that it was *not* thereupon stipulated and agreed between the parties that all proceedings should be stayed until the next term of the court.

The motion for an appeal appears from the record to have been made 25th August, 1862, in open court *ex parte*. The court was then in session at Monterey, and adjourned for the term September 8th, 1862. A special term was held at Los Angeles, which began on the 1st of October, 1862, and adjourned *sine die* on the 7th October. The district attorney, on the 6th October, the day before the court adjourned, signed a stipulation to withhold the transcript and stay further proceedings until the next term of the court to be held at Monterey, "*so as to give the claimant an opportunity to make*" a motion to set aside the order granting the appeal. On the 25th November, 1862, notice was served upon the district attorney that such motion would be made at the opening of the court in Los Angeles in December following, and the motion was at that time heard and acted upon at the very earliest "opportunity" that had been offered the claimant. How, then, under these circumstances, can it be said that the object of the citation, viz., notice, was accomplished?

No stronger case than this can be imagined for the propriety of adhering to the long-settled and time-honored

decisions of the court in regard to the necessity of citation when the appeal is not taken in open court at the same term within which the judgment or decree is rendered.

III.

This court has no jurisdiction, because the appeal was not entered at the term of this court next succeeding the date of the appeal.

This appeal was taken ex parte, August 25th, A. D. 1862. The transcript was not entered and the case docketed in the court till February 29th, 1864.

The construction of the act of Congress regulating appeals, and the practice of the court under it, has been settled by the cases of Villabolos vs. The United States, (16 Howard, 81,) and The United States vs. Curry, (6 Howard, 106.) "The transcript must be filed in this court and the case docketed at the term next succeeding the appeal, in order to give this court jurisdiction. This case must, therefore, be dismissed."

In Mesa vs. United States, (2 Black, 721,) the court say: "Let this appeal be dismissed. It has not been presented in the manner directed, nor within the time limited by the act of Congress, which requires that the transcript should be filed at the next succeeding term after the appeal is taken."

IV.

This court has no jurisdiction, because the pretended appeal, by virtue of which this entry was made, lost all its legal effect by reason of the subsequent proceedings in the district court, on the part of the United States district attorney.

We lay much stress upon the above proposition, for the reason that whatever effect may be given to the discussion

of the questions by the court in 1 Wallace, 690, this point, if well taken, disposes of all the difficulties suggested as to the date of the decree and the necessity of citation.

The record shows that after the appeal was taken, *ex parte*, on the 25th August, by stipulation of the district attorney, dated the 6th October, *the transcript was withheld and all further proceedings stayed* till the next term of the court, to be held at Monterey for the very purpose, as expressed in the stipulation, of giving the claimant an opportunity to make a motion to vacate the order allowing the appeal.

The case, therefore, *still remained in the district court*, subject to its jurisdiction and orders, and no appeal has *ever* been since then taken to the Supreme Court of the United States.

V.

This court has no jurisdiction, because the decree appealed from was not a final decree.

"No appeal will lie from any order or decision of the court below, which is not a final decree."

United States vs. Fossat, 21 How., 445.

"A final decree in equity is one which finally decides and disposes of the whole merits of the cause, and reserves no question or directions for the future judgment of the court."

Barnard vs. Gibson, 7 How., 650.

In Fossat's case, the court said "that the jurisdiction of the district court extended not only to the adjudication of questions relating to the genuineness and authority of the grant, and others of a similar character, but also all questions relating to its location and its boundaries; and does not terminate until the issue of a patent conformably to the decree."

In a previons decision in this case, reported in 23 How-

ard, 326, the court recognizes, and affirmatively adopts the decision in Fossat's case; for, in answer to the objection that the proceedings in the district court, subsequent to the decree confirming the title of the claimants, were invalid, Mr. Justice Wayne, in delivering the opinion of the court, said:

"The case *being still before the court*, we do not perceive any irregularity in the proceedings. Besides the motion for granting the appeal, the court had jurisdiction of the cause to determine what proceedings the claimant was entitled to under the circumstances of the case, to get the benefit of the decree by survey, or otherwise."

The jurisdiction of this court, in respect to appeals from the district court, is derived entirely from the acts of Congress.

"If Congress has provided no rule to regulate our proceedings, we cannot exercise our appellate jurisdiction; and if the rule is provided, we cannot depart from it." 3 Dall., 327.

The appellate powers of this court being limited and regulated exclusively by these acts, unless the regulations required by them are strictly complied with in regard to the taking and the prosecution of the appeal, the appeal is not voidable, but void. Any departure from the requisitions of the acts is fatal to the jurisdiction of the court, in whatever stage of the case the error is discovered.

It follows, therefore, that even if the objections which have been urged to the jurisdiction of this court had not been taken at the first opportunity which offered, it would still be competent for the appellee to present and insist upon the objections; and it would be the duty of the court, at any time, upon finding that its appellate powers could not legally be exercised, to dismiss the case for want of jurisdiction.

If it be urged that the appearance of the claimant at Washington before the Supreme Court is a waiver of all irregularities or submission to the jurisdiction of the court,

the answer is readily found in the fact, 1st, that the Supreme Court can only exercise jurisdiction except in the cases and in the manner prescribed by the acts of Congress, and consent cannot give jurisdiction in cases where the power is not so conferred. And 2d, that the counsel only appeared before the court at the last term specially for the purpose of moving the dismissal of the alleged appeal upon the grounds that five years had elapsed—that there had been no citation, and that the transcript before the court was defective.

QUESTION OF FRAUD, NOT COMPETENT.

But, supposing that this court should decide that this appeal was rightfully here; then it may be suggested that there never was any valid decree in the district court; that the decree of confirmation, which forms the basis of this appeal, was itself a nullity, by reason of fraud.

It is to this consideration that we supposed Mr. Justice Clifford to allude in the opinion of the court in 1 Wallace, 690, where he says, "when this cause comes up upon its merits, we shall desire to hear the counsel upon the question whether there is any valid decree in the case, and if not, as to what will be the proper directions to be given in this cause."

It is denied, however, that it is competent for this court to consider the question of fraud in the present posture of this case, only so far as it may enter into the question of whether the district court had jurisdiction.

If it should be claimed by the appellant that the district court never had jurisdiction, because of fraud, and that, therefore, the decree in question was invalid or void, it is possible that, to this extent, the question of fraud is an open one.

The only evidence in the case to support the assertion that the decree in question never had any legal vitality is the affidavit of Hartman, (see Record, p. 72,) that there

never was any genuine petition addressed to the district court, and that, therefore, the jurisdiction of the court never rightly attached. The answer is, that the presentment of such a petition is not an essential condition to the exercise of jurisdiction by the district court.

The act of 1851, ch. 41, § 8, made it the duty of the board of commissioners, in all cases, to certify their decision to the United States district attorney for the district in which their decision was rendered. The ninth section of the same chapter provides that when the claim is rejected by the commissioners it shall and may be lawful for the claimant to present a petition to the district court of the United States of the district in which the land is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim.

Upon this statement of the law a petition would seem to be necessary to give the court jurisdiction. But the next year, in 1852, Congress passed an act (see U. S. Statutes, vol. 10, p. 99,) which requires the commissioners, where the decision is adverse to the claimant, in all cases, to cause a certified transcript to be prepared of their proceedings and decision, and of the papers and evidence on which the same are founded; which transcript shall be filed with the clerk of the proper district court, and the filing of such transcript with the clerk aforesaid shall, *ipso facto*, operate as an appeal for the party against whom the decision shall be rendered.

It is the performance of this duty, therefore, by the commissioner, which gives the district court jurisdiction; and, whether the petition, which purported to be signed by Hartman & Sloman, was a genuine document or not, was immaterial. In fact, under the law of 1852, it is confidently submitted that it was not necessary to file any new petition. The transcript of the original petition before the board of commissioners was sufficient to advise the court of the nature of the claim.

If our position be correct, that there is nothing in the record to justify this court in finding that the decree in question, of the district court, was void as opposed to voidable, we then submit that it is not competent for this court to consider the question whether or not this decree ought to be avoided because of the circumstances which took place in the subsequent proceedings of the district court in this case.

First. These proceedings were irregular and extra-judicial, and should form no part of the record in this case. The jurisdiction of the court, if this decree were final, was exhausted at the time when the decree, in open court, and in the presence of both parties, was signed and entered upon the record. Whether the parties were honestly represented or not does not affect the question of jurisdiction. The decree was a finality, and, after the lapse of a term, could not be reached by any power which the court had as incident to the jurisdiction which it had acquired by virtue of its original proceedings.—(Bank of the United States vs. Moss, 6 Howard, 36.) If the decree were tainted with fraud, and, therefore, to be condemned, the proper way to do it was to institute new proceedings by a petition for a bill of review, in which the charge of fraud should be distinctly made, and the opportunity given to the respondent to make a distinct denial, so that the issue should be distinctly raised and presented to the court.

Second. The validity of the decree of the district court is to be tested by the allegations and the proofs as they stood at the time the decree was made. The court should confine itself to the merits of the decree as the case presented itself when the decree was rendered. It cannot, under this appeal, go into a matter which occurred subsequent to the decree, and which would be the proper subject for consideration in a petition for a bill of review.

So much of the record as relates to the proceedings

which took place in the district court on the motion to set aside the original decree, should be disregarded as inadmissible and irrelevant. Everything should be excluded from the record which describes or relates to matters that took place after the decree appealed from, except what pertains to the question whether an appeal was properly taken.

According to the practice of the court of chancery, from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal.—(Taney, C. J., Russell vs. Southard, 12 How., 80.)

The act of Congress of March 3d, 1803, expressly prohibits the introduction of any evidence in this court, on the hearing of an appeal, except in admiralty and prize cases.

If the district court had the right to hear and decide the motion to vacate the decree and reinstate the case on the docket—which is denied—nothing relating to that motion should be considered by this court, in deciding the questions presented by this appeal.

The inconveniences of stuffing the record with matter which is foreign to the true questions at issue, have been strikingly illustrated by the history of this case. If the decree in dispute is vitiated with fraud, let it be annulled by proper proceedings. The law provides a remedy. But there is no discretion vested in the court which will authorize it to disregard a positive rule of law, with the hope of defeating the fraudulent practices of dishonest men.

It appears, too, in this case, that the land claimed is now owned by Willam McGarrahan, of California, who purchased the same in December, 1857, after the decree of confirmation was pronounced by the court, who had no suspicions that there was anything frudulent in the judicial proceedings by which the title was confirmed.

He stands here, therefore, as an innocent purchaser, without notice; and if the true date of the decree confirming the title of his grantor to the land is June 5th, 1857, then the case in the district court must be regarded as finished before the purchase, and McGarrahan is not within the rule, that *lis pendens* is a general notice of equity to all the world. After a decree, final in its nature, there remains no *lis pendens*.—1 Vern., 459.

How stood Gomez' title when it was purchased by McGarrahan? A brief reference to the history of this case prior to this purchase, will show that nothing had then occurred which should cause McGarrahan to suspect that there was any infirmity in Gomez' title.

In 1844 the Mexican government makes a grant, upon the usual conditions, of four leagues of land, called the Panocha Grande, to Vincente Gomez. The war supervening, prevents the grantee from complying with the terms of the grant. The war is ended, and California is ceded to the Federal government. To ascertain and settle private land claims, a special tribunal is established. All claimants are, by law, required there to produce and prove their claims. Gomez does so. No objection is made to the genuineness of the grant. But the board hold that non-compliance with the conditions of the grant works a forfeiture thereof, and they reject the claim. The claimant appeals from this decision to the U. S. district court. In the meantime the United States Supreme Court decided that failure to comply with the conditions of the grant does not work a forfeiture.—Fremont's case, 17 How., 542. This decision removes the only objection to the allowance of the claim. The case is brought up for decision, and the claim is confirmed. Through inadvertence of the court, a formal decree is not signed and entered at the time; but subsequently it is done, as a matter of course, and entered nunc pro tunc.

Such was the posture of this case when McGarrahan succeeded to Gomez' title. Is not his relation to this prop-

erty identical with or analogous to that of an innocent purchaser without notice?

But if McGarrahan cannot be regarded as an innocent purchaser without notice, but must be considered as, strictly speaking, subject to the equities which existed in favor of the United States at the time of his purchase, those equities have lost much of their force by reason of the laches and want of diligence on the part of the United States authorities.

"When a party discovers a fraud he is bound to be prompt in communicating the discovery and consistent in the use he proposes to make of it."

Boyce's Executors vs. Grundy, 3 Peters, 210.

An inspection of the record shows that no steps were taken by the United States to set aside the decree of confirmation until the 7th of July, 1858, when Mr. Stanton, the special counsel for the government, filed a motion for that purpose. This motion was not filed until after the final adjournment of the June term, in 1858, in vacation. No argument or hearing appears at any time to have been had upon said motion; nor does it appear that the claimant had any knowledge or notice that such motion was filed. On the 11th January, 1860, another motion was filed by the United States district attorney to set aside said decree, and at the same time moved a continuance. After further delay and continuance the court, of its own motion, March 21, 1861, *four years* after the decree was pronounced, ordered the decree of confirmation to be set aside and the cause to be restored to the docket.

Meanwhile the motion for an appeal, which had been filed by Mr. Kerwen, as special attorney for the United States, was withdrawn, and no appeal was afterwards taken till August 25, 1862, more than five years after the decree of confirmation was pronounced.

It will be noticed by an inspection of the record, and by a review of the history of the case, as it is known to this court, that nearly all the proceedings which have been

conducted nominally in behalf of the United States have been managed by special counsel, who are supposed to represent the interests of the trespassers, who are holding adversely, as well against the interests of the United States, as against the interests of McGarrahan, who has succeeded to Gomez' title—using, or rather abusing the remedies which the law gives to the United States to defeat, *first*, the title of McGarrahan, and, when that is accomplished, *second*, to resist the title of the United States.

In Fossat's case, 20 Howard, 413, Mr. Justice Campbell, in delivering the opinion of the court, said, "It is the opinion of the court that the intervention of adversary claimants in the suit of a petitioner, under the act of 3d March, 1851, is a practice not to be encouraged."

Is it just or equitable to allow third parties, who, in fact, are mere squatters, to usurp the name and authority of the United States, in bad faith, using the forms and instrumentalities of law simply to promote their own purposes? And is an innocent purchaser to be kept for years in suspense, and finally to be deprived of the land which he supposed he had purchased, when the officers of the United States had suffered the matter to be continued from year to year, and to be managed entirely by counsel who were quite content that the rights of the United States should never be recognized or established by the court, if they could only defeat, by interminable delay or otherwise, the title of the claimant? Does not such a policy on the part of the United States tend seriously to weaken and impair any equities which might once have existed in favor of the United States, as against this claimant?

The duty of the court is limited to the consideration of the merits of this decree, as this case stood in the district court when the title of the claimant was confirmed,

As the law was then understood the claimant had a

good case. It had recently been decided by this court, in Fremont's case, 17 Howard, 542, that it was not essential to prove possession subsequent to the grant, which the commissioners, as appears by their opinion, (Record, p. 60,) supposed to be necessary, and it had not been then decided by this court that archive evidence of the grant was indispensable.

As the law is now administered by this court, the claimant did not prove a good title to the land which he claimed. He did, however, prove everything that was supposed to be required by the law at the time his title was confirmed by the district court. It does not appear but that he could, if an opportunity were allowed him, supply the defect in his proof and present a claim which shall satisfy the requirements of law.

It is submitted, therefore, if this court should conclude that it had the right to entertain the appeal, that the decree appealed from should be vacated and the case remanded to the district court for a new trial.

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